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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 717

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, ETC.,

Appellants,

vs.

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

PHILIP ADLER,
Counsel for Appellants.

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COURT OF APPEALS, STATE OF NEW YORK

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA,

Plaintiff-Appellee,

against

JOHN KEDROFF AND BENJAMIN FEDCHENKOFF, AS ARCHBISHOP OF THE ARCHDIOCESE OF NORTH AMERICA AND THE ALEUTIAN ISLANDS OF THE RUSSIAN ORTHODOX GREEK CATHOLIC CHURCH,

Defendants-Appellants

STATEMENT AS TO JURISDICTION

Appellants having presented this day their petition for appeal now file this, their statement, of the basis on which they contend that the Supreme Court of the United States has jurisdiction on appeal to review the judgments in question and to exercise such jurisdiction in this case.

The Statutory Provisions Which Sustain the Jurisdiction

The appeal is prosecuted from a judgment of the Court of Appeals of the State of New York, which is the highest court of the State of New York, in which a decision in the within matter can be had, and the judgment of the Supreme Court of the State of New York entered pursuant to the remittitur of said Court of Appeals. There is drawn into question the validity of Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, c. 693, as amended, Laws of 1948, c. 711), on the ground that, as

construed and applied it is repugnant to the First and Fourteenth Amendments to the United States Constitution. The decision of the Court of Appeals was in favor of the validity of this statute. The Supreme Court has jurisdiction on appeal to review the final judgments in question by virtue of the express provisions set forth in Title 28 of the United States Code, Section 1257.

The cases which sustain the jurisdiction of the Supreme Court are:

Saia v. *New York*, 334 U. S. 558;
Kunz v. *New York*, 340 U. S. 290.

Additional Grounds of Jurisdiction

The appellants also contend that the judgment is founded on other errors apart from the above statutes, which, though they either are procedural or involve questions of substantive law not subject to review by this Court on appeal, nevertheless deprived the appellants of a fair hearing and constituted a denial of due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment. These errors are included in the assignment of errors and are set forth below at page 15. If they were the only errors complained of, the appellants would be limited to a petition for a writ of certiorari. They are included in this petition for appeal under the authority of Title 28, U. S. Code, Section 2103. *Flournoy* v. *Wiener*, 321 U. S. 253, authorized inclusion in assignments of errors on appeal "any other denial of federal right whether or not capable in itself of being brought here on appeal" (p. 263), in which event the non-appealable issues will be considered along with the merits of the appealable issues. (See *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 547.)

The Date of the Judgments Sought to be Reviewed and the Date on Which This Application for Appeal Is Presented.

The judgment of the Court of Appeals which is here sought to be reversed was rendered on November 30th, 1950. The judgment, pursuant to that Court's remittitur, was entered in the Supreme Court, New York County, on April 4th, 1951. Motion for leave to reargue the decision and judgment of the Court of Appeals was returnable in said Court of Appeals on January 15th, 1951. Said motion for reargument was seasonably made within the time limit allowed by the Court of Appeals. During the month of December, 1950, there was only one (1) motion date in the Court of Appeals, to wit, December 2nd, 1950; there were two (2) motion days in the Court of Appeals during the month of January, 1951, to wit, January 2nd and January 15th, 1951. By stipulation between the parties, the motion for reargument was made returnable on January 15th, 1951 to enable both counsel to give full consideration to the questions involved in the suit, particularly in view of the complexity thereof, and the intervening Christmas holiday. The Court of Appeals entertained and considered the motion for reargument on the merits and denied the same on the 9th day of March, 1951. This application for appeal is presented April 11th, 1951.

How Constitutional Questions Were Raised

The constitutional issues of this case were expressly considered by the Court of Appeals of New York as appears both from the opinions there rendered and from the Court's amended remittitur. In the latter, the Court stated:

> "Ordered that the motion for reargument be and the same is hereby denied. The remittitur is amended by adding thereto the following: Upon this appeal there

was presented and necessarily passed upon a question under the Constitution of the United States, viz, whether Article 5-C of the Religious Corporations Law, as construed by this Court, violated any rights of the defendants guaranteed by the First and Fourteenth Amendments of the Constitution of the United States. This Court held that the aforesaid statute did not violate any of the rights of the defendants guaranteed by those Amendments to the Constitution of the United States."

The above constitutional issues were raised before and considered by the Appellate Division (276 App. Div. 309, 316). The Trial Court having decided the case in favor of appellants and having held that the statute had no application to the case, found it unnecessary to discuss the consituational issue (192 Misc. 327, 333).

The Statute Involved

The statute is Article 5-C of the Religious Corporations Law of the State of New York (Laws of 1945, ch. 693, as amended by Laws of 1948, ch. 711). It deals with "Russian Orthodox Churches". Its full text is set forth in "Exhibit A" hereto. In substance:

(a) It defines a group of churches as a separate and autonomous religious body called the "Russian Church in America." Until April 1924, these religious organizations had belonged to a larger group constituting, under successive names, the American Diocese of the Russian Orthodox Church, and had theretofore been subject to the jurisdiction of the Most Sacred Governing Synod in Moscow and later the Patriarch of Moscow. In April 1924, at a convention in Detroit, this group of churches constituted themselves as an "administratively autonomous metropolitan district", and thus seceded from the American Diocese and from the Russian Orthodox Church to which the American Diocese remained subject (sec. 105).

(b) It defines a "Russian Orthodox Church" as a church, "Founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission, diocese or autonomous metropolitan district *hereinabove defined as the Russian Church in America*" (sec. 105).

(c) It provides for the government of *incorporated* Russian Orthodox Churches. It directs that "every" Russian Orthodox church in the State of New York, "whether incorporated before or after the creation of said autonomous metropolitan district . . . shall *recognize and be and remain subject to the jurisdiction and authority of the . . . archbishop or other hierarch or primate" and other "governing bodies and authorities of the Russian Church in America*" (sec. 107 (1)). And it gives to the trustees of every such Russian Orthodox church "the custody and control" of all its temporalities and property, and requires them to "administer" the same "in accordance with the . . . rules and statutes . . . of the Russian Church in America" (107 (3)).

By force of this statute as construed and applied by the Court of Appeals, appellant Benjamin, who was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by appointment of the Patriarch and the Holy Synod, the Chief Authority of the Russian Church, and who was occupying St. Nicholas Cathedral of that Church, as such Archbishop, under the canon law of that Church, was ousted from such possession, and occupancy to the Cathedral was awarded to the appellee.

Statement Respecting Opinions

The Court of Appeals reversed the decisions of the lower courts in favor of appellants and directed judgment in favor of appellee by a vote of four to three. Three opinions were written. One majority opinion of the Court of Appeals was written by Judge Conway. A concurring opinion was writ-

ten by Judge Froessel and a dissenting opinion by Judge Desmond. Copies of the opinions are hereto annexed as "Exhibit B". They are reported in 302 N. Y. 1.

The Appellate Division ruled in favor of appellants by a three to two vote. Its opinions are annexed as "Exhibit C". They are reported in 276 App. Div. 309.

The opinion of the Trial Court is annexed as "Exhibit D". It is reported in 197 Misc. 327.

Statement Showing that the Nature of the Case and the Rulings of the Court Are Such as to Bring the Case Within the Jurisdiction Relied On.

This is a suit in ejectment. Appellee, a New York Corporation, holds the nominal legal title to St. Nicholas Cathedral in the City of New York. It represents a group of Russian Churches, who, in 1924, at a convention in Detroit, purported to secede from the Russian Church at large and organized themselves into an "autonomous metropolitan district". Appellant Benjamin was the Archbishop of the American Archdiocese of the Russian Orthodox Church, by virtue of his appointment to that office by the Patriarch, and he asserted the defense that, as such accredited Archbishop, under the canon law of the Russian Church, he had the exclusive right to occupy the Cathedral.

The Court of Appeals held (1) that the statute was "conclusive" and required the ouster from the Cathedral of appellant Benjamin, the appointed Archbishop; (2) that, absent the statute, the trial court, on a new trial should, because the Patriarchal Church is not "free", exercise its "discretion" to determine if the appointed archbishop is a "proper" person or "trustee" to administer the Cathedral; and (3) refused, while directing final judgment against him, to rule on the merits on appellant Benjamin's defense of the statute of limitations.

Title to the Cathredral was originally held in a New York corporation, Russian Orthodox St. Nicholas Church, of which the Russian Ambassador and the Consul General of New York were the sole trustees. In 1916, that corporation, by leave of the Court, gave the deed to the Cathedral to Archbishop Evodokim, the appointee of the Holy Synod. In the moving papers, the Archbishop and the trustees stated that the corporation held merely the nominal "title", that the beneficial ownership of the Cathedral was in the Russian Church under the management of the Archbishop, subject to the superior authority of the Holy Synod (1161-70). In 1917, Archbishop Evdokim retransferred the deed to the grantor corporation, which, in 1925, gave the deed, without any consideration, to appellee (411). After the decision in *Kedrovsky* v. *Rojdestvensky*, 214 App. Div. 483, affirmed, 242 N. Y. 547, which rejected the claim to the Cathredral by the Archbishop *elected* at the Detroit convention and awarded possession thereof to the Archbishop *appointed* by the central church authorities, appellee surrendered possession of the Cathedral in 1926 and about twenty (20) years later, in 1945, it brought this suit of ejectment.

Appellee's title is thus nominal only and does not carry with it the right of possession, which is determined by canon law. If, as seems clear, appellee's grantor could not have ejected Archbishop Evdokim from possession of the Cathedral, then appellee cannot oust his successor in office, Metropolitan Benjamin, unless article 5-C may constitutionally so authorize.

The extent to which that statute invades and destroys religious liberty can more readily be determined by examining the nature and status of the Russian Church at the time the statute was passed.

The Russian Orthodox Church

The Russian Orthodox Greek Catholic Church, hereafter referred to as the Russian Orthodox Church, is an hierarchal church and the supreme authority is vested in a Patriarch and Holy Synod. They in turn derive their authority from Sobors or general conventions of the Church (110-3).[1]

From the time of Peter, no Sobors were permitted by the Czars (597). Peter abolished the office of Patriarch and vested supreme authority in a Holy Synod, of which, his procurator was the chief official (110, 531-4). In 1917-18 the first Sobor since Peter's time was held in Moscow and that body restored the authority of the Patriarchate (112, 138, 597). There was a brief interregnum during the early years of the Russian Revolution, but by 1927, a Patriarchal Locum Tenens was in office, the Holy Synod was functioning again and the Patriarchal Church was re-established (188, 578, 593-4). The last Sobor was held in 1945 and the present Patriarch was then elected (111, 189, 595). The canonical validity of this Sobor and the Patriarch's election is not questioned (188-91, 593-4, 1230-7). The Patriarch is in full communion with all Christian Churches (597, 214).

The majority opinions stress the persecutions of the Patriarchal Church by the Soviets (302 N. Y. 1, 6-8), but the survival of that Church attests to its vitality and indestructibility. Like persecutions failed to destroy the French Church during the French Revolution. The aim of the leaders of the French Revolution was "the extinction of the Christian religion in general and of Catholicism in particular" (Phillips, *The Church in France, a Study in Revival,* p. 12). The lands of the Church were confiscated, the religious orders were suppressed, many of the clergy

[1] Numbers in parentheses refer to folios of the printed record.

were executed, the survivors were converted into civil servants, and the authority of the Pope over the Church was abolished (Phillips, *supra*, pp. 23-27). However, within a generation, the Church resumed its vital place among the French people. The same may be said of the Russian Church.

The American Archdiocese

The Russian Church first established itself on this continent at the end of the 18th century in the Aleutian Islands and Alaska at a time when these territories were part of the Russian Empire (113-4). When Alaska was ceded to this country, the authority of the Holy Synod over the Diocese of Alaska remained undisturbed. Thereafter, the church established a number of communities in this country and Canada.

At first, the Church here was called a Mission, then a Diocese, then an Archdiocese. The official name of the Archdiocese is "Archdiocese of the Aleutian Islands and of North America" (58-9, 114-7, 1127, 1198).

The Government of the Archdiocese

At first, the Church on this continent was governed directly by the Holy Synod (115), then through its agent, the Archbishop, who was an official appointed by the Synod (116, 152), answerable exclusively to it and subject to suspension, removal, transfer or replacement at the pleasure of the Synod (127-133, 819).

Under Russian Church law, which remains unaffected by any changes in temporal power, the Archbishop of the American Archdiocese is not *elected* by the local churches or clergy; they have no power to do so; he is appointed only by the Supreme Church Authorities of the Church at large (117, 152-6, 699, 702-3). In point of fact, all the

Archbishops who served here were in each instance *appointed* by the Supreme Church Authorities (129-31). Indeed, the appointment of the Archbishops was, prior to 1917, by ukase of the Czar (534). The Archdiocese was governed not by the local churches or clergy but by the Archbishop, and he was answerable not to them, but to the Supreme Church Authorities who appointed him.

Relation Between the American Archdiocese and the Church at Large

An Orthodox Church is not an aggregate or collection of separate or discrete parts, of parishes and dioceses, which are free to federate or separate at pleasure. An Orthodox Church is an indivisible whole. Indeed, it has no parts. It is a unity and, by hypothesis, no diocese or parish may of its own will leave the Church or, what is even less tolerable, consider itself a part of the Church and live "autonomously" or be "self-governing" without breaking the unity, the indivisibility, the integrality of the whole. There is and can be only one Russian Orthodox Church.

Canon law does not permit secession or fission in the church under this or that set of circumstances, for this or that reason; there is an absolute bar to such conduct (821). And those who by assertion of their own power undertake to secede or to be "autonomous" or "self-governing," cut themselves off from the church and all rights to its property (*Watson* v. *Jones*, 13 Wall 679; *Trustees of Presbytery* v. *Westminster Church*, 222 N. Y. 305).

Saint Nicholas Cathedral

This Cathedral was built about 1903 with money supplied by the Church in Russia and the Russian government, amounting to about $150,000. They contributed further substantial sums for its maintenance and upkeep (819, 122).

In 1905, the Cathedral was consecrated as the See of the American Diocese and the official residence, place of worship and headquarters of the Archbishop (63, 131).

The right of the duly accredited Archbishop of the American Archdiocese, appointed by the Supreme Church Authorities in Russia, as an attribute of his Episcopal office, to possess, occupy and use Saint Nicholas Cathedral as his residence, as a place of worship, and as the seat of his government of the Archdiocese, has never been questioned (820, 826-7, 131-2, 703). Even the majority opinion acknowledges as much (302 N. Y. 1, 4, 6). The testimony of the witnesses is unanimous on that point. All the appointed Archbishops have so occupied it (131). Defendant Metropolitan Benjamin is the accredited Archbishop by virtue of his appointment to that office by the Patriarch (669, Defdts.' Ex. C, 1097, 827). He has been occupying the Cathedral as such Archbishop since 1945 (704, 1198).

In *Kedrovsky* v. *Rojdestvensky*, 214 App. Div. 483, affirmed 242 N. Y. 547, which is identical with the case at bar and, apart from the statute, is decisive of the case, it was held that under the canon law of the Russian Church, Saint Nicholas Cathedral is held in trust for the Archbishop, *appointed by* the Chief Authorities.

Notwithstanding the above, the majority of the Court found that the Cathedral "has been dedicated to the use of members of a parish and of a diocese" or "dedicated to the use of all the members of the diocese" (302 N. Y. 1, 4, 34). This has the effect of converting the Russian Church from an hierarchal to a congregational body. Whatever rights the faithful may have in the Cathedral, they are subordinate to the rights of the canonical archbishop and cannot include the right to oust him because the Russian is not a congregational church.

The Metropolitan District

In 1924, a group of Russian churches on this continent met in a convention in Detroit and declared themselves to be "a self-governed Church • • • governed by its own elected Archbishop" and elected Platon (Rojdestvensky) as such Archbishop (931-3).[2]

This state of affairs was to continue "temporarily" i.e., until the convocation of an "All Russian Sobor (931) • • • under conditions of political freedom" (935), presumably in Russia. In the meantime, the decision was "not to break at all the spiritual ties and communion with the Russian Church, give her every cooperation and mention the Most Holy Patriarch as the Head of the Russian Mother Church" (934). The contradiction between regarding the Patriarch as the "head" of the Russian Church and at the same time attempting to expel his accredited Archbishop from St. Nicholas Cathedral, which was built for his exclusive use, is not resolved by appellee or the majority in the Court of Appeals.

This "self-governed Church" called itself an "autonomous metropolitan district."[3] In 1943, Metropolitan

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[2] The majority rely on the self-serving declarations of the orators at Detroit to justify the secession (302 N. Y. 1, 11-12). No doubt comparable speeches were made, seeking to justify the secession dealt with in *Watson* v. *Jones* (8 Wall. 679)—to no avail. The nub of the matter was stated by one speaker in Detroit who said, "We ourselves establish Church authority for ourselves" (914). But this was an impermissible breach of the canon law. The civil courts are concerned not with the *why* but only with the *fact* of secession and its legal consequences, viz, the loss by the seceders of the property under the control of the central church authorities.

According to the *Kedrovsky* record about 160 churches attended the Detroit convention. The record in our case is silent on the point. In 1945 this self governed church claimed 350 churches (1062) and in 1948 only 250 (796).

[3] This autonomy was not declared "pursuant" to the Patriarchal order of November 1920 (889-900), as the majority assert (302 N. Y. 1, 33, 12, 34). That order authorized temporary, local action by bishops of dioceses in

Theophilus was elected head of the District to succeed Platon who had died in the meantime (179-80). In 1936, the District subjected itself to the supreme authority of a group or Synod of bishops, domiciled in Karlovitz, Yugoslavia, calling themselves the "Russian Church Abroad", which purported to act as a rival to the Patriarchal Church outside of Russia (192, 601, 730, 764-8, 1223-8). The District pledged "loyalty" to this Synod of Bishops (1227-8), which first sought the restoration of the Czar, then joined its fortunes to those of Hitler (735-42, 606, 1214), and their "jurisdiction" went the way of that protector of religion (1225-9). With the liberation of Yugoslavia, the "Russian Church Abroad" followed Hitler back to Germany and their bishops settled in the Displaced Persons Camps in Germany (1211-12, 1224, 751). The Metropolitan District continued under the authority of this Synod while Hitler was in control of Yugoslavia and only withdrew from that organization in 1946[3a] (768, 1094) when the "Russian Church Abroad" had ceased to exist altogether (1125-7). As a result four bishops and a number of churches seceded from the District (834, 202, 1220).

The life history of the Metropolitan District is this: In 1924 it withdrew from the Russian Church at large, in 1936 it subjected itself to the authority of the Karlowitz Synod and in 1946 it seceded from that organization, resulting in a split in the Metropolitan District (769).

The Chief Authorities of the Russian Church at all times

Russia which were cut off "for reasons of movement of the front" (891) during the Civil War, had no application to the American Diocese and was not referred to in the resolutions at Detroit. In any event, any action taken thereunder had to be confirmed by the Patriarch (900) and all the actions of the metropolitan district, were not confirmed, but condemned (822-5).

[3a] The metropolitan district also "resolved that His Beatitude, Alexy, Patriarch of Moscow, and all Russia, be requested to continue us in his fold and be our Spiritual Head" on condition of autonomy.

took the position that the organization of the Metropolitan District and the actions of Platon and Theophilus in relation thereto violated "the canons, rules and usages of the Russian Orthodox Church and are null and void" (822, 825); in 1933, 1935 and on other occasions, they made formal rulings to this effect, and placed Platon and Theophilus and their associates under suspension which is still in force (822-6). Like rulings were made outlawing the Karlowitz Synod from the very beginning (601-4, 730).

Subsequent to the Sobor of 1945, negotiations between the Patriarch and the Metropolitan District proceeded up to the date of trial in 1948 for reunion (1344-50, 2081-3). These negotiations foundered on the purely ecclesiastical issue as to the extent of the Patriarch's power to confirm locally elected bishops (1118-20, 1069). The alleged "pledge of loyalty" to the Soviet Government had no bearing on the matter as the Appellate Division found (276 App. Div. 309, 319-20). This misnamed pledge was in reality, as Metropolitan Benjamin testified, a policy of "refraining from politics only . . . both in the church and in the name of the church" (650-1): that the "answer of the Russian Church is absolutely clear. It cannot prevent any citizen from fulfilling his obligations and does not demand it (657). . . . as individuals they may criticize, but they cannot do that in church, in the name of the church, because that would be injurious to the church" (659); that this was an "expression of the Christian attitude to the government" (617). This was also the position of the metropolitan district which admonished its clergy, "for the general welfare, not to touch upon political questions . . . especially from the pulpit" (1066).

The Constitutional Issues Presented

1. Is the ouster, by force of the statute, of Appellant Benjamin, the appointed archbishop, from St. Nicholas Cathedral, a violation of protected religious liberty?

2. Is such ouster, by force of the statute, a deprivation of property without due process?

3. Is the retroactive application of the statute to the case at bar, which was commenced one day *before* the statute became law (379-90), a denial of due process?

4. Is the direction that the trial court exercise its "discretion" to determine if the appointed archbishop is a "proper" person or "trustee" to occupy St. Nicholas Cathedral, a violation of protected religious liberty?

5. Does the failure and refusal of the Court of Appeals to rule on the merits of the appellant Benjamin's defense of the statute of limitations, violate due process?

6. Is the disposition of the case by the Court of Appeals on common law grounds a denial of due process?[4]

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[4] To find, by "judicial notice", that the Patriarchal Church is not "free" and to make that finding a "determinative" ground of the decision against appellants; to find that St. Nicholas Cathedral was dedicated "to the use of members of a parish and of a diocese" in the face of unanimous testimony that the Cathedral was built for and dedicated to the exclusive use of the appointed Archbishop; to use, as facts of recent Russian Church history, "vital" to the Courts' "duty . . . to identify the true and proper beneficiary" of the Cathedral (302 N. Y. 1, 4), testimony, not in the record in the case at bar, but offered by the defeated defendants in the *Kedrovsky* trial and *rejected* by the Appellate Division in that case (214 App. Div. 483, aff. 242 N. Y. 547); all this, we submit, is a denial of due process.

It may be that such denial of due process, because it is linked with a direction that the trial court exercise its "discretion" to determine whether appellant Benjamin is a "proper trustee" to occupy the Cathedral, does not, at this state of the case, possess the requisite finality for present review by the Supreme Court. However, if appellants are mistaken in this respect, they urge such denial of due process as one of the grounds for review by the Supreme Court.

ARGUMENT

I. The Statute, as Construed and Applied by the Court of Appeals, Constitutes an Abridgment of Freedom of Religion Guaranteed by the First and Fourteenth Amendments to the United States Constitution.

It is now settled that the States as well as Congress must obey the command of the First Amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof, . . .".

The Supreme Court has characterized freedom of religion as "implicit in the concept of ordered liberty". (*Palko* v. *Connecticut*, 302 U. S. 319, 325); it has assigned to it a "preferred" position among our basic liberties (*Marsh* v. *Alabama*, 326 U. S. 501, 509; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 155; *Follett* v. *McCormick*, 321 U. S. 573, 577); it has reversed the rule of presumption, declaring that where the statute touches an area protected by the First Amendment, the presumption is *against* its validity (*The West Virginia School Board of Education* v. *Barnette*, 319 U. S. 624, 639; *United States* v. *Carlene Products Co.*, 304 U. S. 144, 152 note 4; *Prince* v. *Massachusetts*, 319 U. S. 158, 173; Murphy, J., dissenting).[5]

The Supreme Court has recently given expression to the principles which give religious freedom constitutional immunity from invasion by the civil power.

In *Everson* v. *Board of Education*, 330 U. S. 1, the Court affirmed the historic position of this country, ever since the adoption of the Constitution, that church and state shall forever be separated and said:

> (p. 15) "The 'establishment of religion' clause of the First Amendment means at least this: Neither a

[5] The Court of Appeals erroneously applied to Article 5-C the rule of presumption generally applicable to statutes concerned with commercial or like secular activities (302 N. Y. 1, 30).

> State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion * * * Neither a State nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice-versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'."

The constitutional guarantee of religious freedom means, the Court further said, that the state shall be "neutral" in the field of religion (p. 18) and shall not "favor" or "handicap" one church as against another (p. 18).

McCollum v. *Board of Education*, 333 U. S. 263, reaffirmed the principles of the *Everson* case, and said:

> (p. 212) "For the First Amendment rests upon the premises that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective spheres or, as we said in the *Everson* case, the First Amendment has erected a wall between church and state which must be kept high and impregnable."

In his concurring opinion, Mr. Justice Frankfurter cited with approval the statement of Judge Jeremiah S. Black (note 8, p. 219):

> "The manifest object of the men who framed the Constitution of this country was to have a state *without religion* and a church *without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other." (Italics in original)

The constitutional guaranty not only protects religious belief, but also the "free exercise thereof". In *Cantwell* v.

Connecticut, 310 U. S. 296, the Court defined the "double aspect" of the constitutional guaranty as "freedom to believe and freedom to act", saying:

> (p. 303) "On the one hand it forestalls compulsion by law of acceptance of any creed, or the practice of any form of worship. Freedom of conscience and freedom to *adhere to such religious organization* or form of worship as the individual may choose, cannot be restricted by law. On the other hand it safeguards the free *exercise* of the chosen form of religion. Thus, the Amendment embraces two concepts—freedom to believe and freedom to act." (Italics added)

In other words, the governance of a Church as well as its creed is within constitutional protection.

Representative applications of the principles are found in the following cases:

Pierce v. Society of Sisters, 268 U. S. 514, sustained a parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the State's requirements of attendance at public schools.

Cantwell v. *Connecticut*, (310 U. S. 296; *Marsh* v. *Alabama*, 326 U. S. 501; *Murdock* v. *Pennsylvania*, 319 U. S. 105; and *Martin* v. *Struthers*, 319 U. S. 141) and a number of like cases, have held restrictive of religious liberty, statutes or ordinances which have sought to impose taxes on, or to require licenses for, solicitation of funds for religious purposes or the sale or distribution of religious literature in public or private areas or similar evangelical activities.

The West Virginia School Board of Education v. *Barnette*, 319 U. S. 624, condemned, as an invasion of religious liberty, a requirement that children salute the flag in public schools.

McCollum v. *Board of Education*, 333 U. S. 203, barred the State from using its public school facilities to aid a

program of released time for religious instruction of children.

Particularly in point is the landmark case of *Watson* v. *Jones*, 13 Wall. 679, where this Court emphasized the incapacity of the civil power to sit in judgment on the jurisdiction of religious bodies or the nature of their actions, saying:

> (p. 730) "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of religious associations, bearing on their own members, are not examinable here. * * *"[6]

The Court also pointed out (p. 727) that under our legal system, having in mind the fundamental principle of separation of church and state, all legal tribunals must accept as conclusive and final the acts, decisions and determinations of the chief authorities of a church, respecting any ecclesiastical matter whatever. There it was specifically held that all bodies of the Presbyterian Church were bound by the declaration of the Chief Authorities with respect to the controversial question of slavery and that a subordinate body of the Church could not lawfully secede and join the southern branch of the Church which had purported to establish a church organization independent of the main body and, in the event of secession, their property remains subject to the jurisdiction of the central church.

We thus see that the Supreme Court has been zealous to keep the exercise of religion and the governance of

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[6] The relation between a church and the Caesar of the moment involves matters of ecclesiastical policy and discretion and the judgment of the chief guardians of the Church in this respect is, under the doctrine of the above case, beyond judicial or legislative control.

Churches immune from the civil power, whatever be the form or method of attempted invasion.

The substance of the matter, we submit, was expressed by Mr. Justice Jackson in *Prince* v. *Massachusetts*, 321 U. S. 158, when he said:

> (p. 177) "Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be."

Turning to the case at bar, Article 5-C, as construed and applied here, is, we submit, a gross and direct interference with religious liberty violative of the First and Fourteenth Amendments.

We do not have here a statute "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantive interest of the state" (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311) but a general statute outlawing a Church in its entirety.

The canon law of the Russian church says that the archbishop appointed by the Patriarch must occupy St. Nicholas Cathedral. The statute says no; the archbishop elected by a seceding group of churches shall do so and, as a consequence, the accredited archbishop is ousted from possession and is barred from conducting religious services in the Cathedral.

The canon law says that a mission or diocese of the Russian Church, such as the American Archdiocese, is subject to the ecclesiastical government of the chief authorities and may not canonically secede from the church. The statute not only sanctions this but awards the Cathedral to the seceders, contrary to *Watson* v. *Jones, supra.*

The canon law says that a bishop shall be appointed by the chief authorities of the church or, if locally elected, shall be confirmed and consecrated by higher authority, so that the chain of apostolic succession may not be broken. The

statute requires all Russian churches, even though they question the regularity of the apostolic succession of the elected, but unconfirmed, archbishops of the seceders, to "recognize and be and remain subject to the jurisdiction and authority" of the seceders and such elected but unconfirmed archbishop.

The statute says that "every" Russian church and all its properties "shall be and remain subject to the jurisdiction" of the Metropolitan District and its elected archbishop, thereby dispossessing the Patriarchal church from all its properties and preventing any of its churches from existing in this state.

By this statute, the civil power departs from its position of "neutrality" in the field of religion and "prefers" the seceding group to the total exclusion of the Patriarchal church.

The statute literally establishes the Metropolitan District as the official Russian Orthodox Church in this state—an express violation of the First Amendment, which declares that the state "shall make no law respecting the establishment of religion . . ."

A statute that directs that the trustees of "every" Russian church in this state "shall administer" the properties of all such churches in accordance with the "statutes" and "rules" of the Metropolitan District "prohibits" the "free exercise" of religion by the Patriarchal Church as guaranteed by the First Amendment.

A statute that commands that a church "shall recognize and be and remain subject to the jurisdiction and authority" of one church instead of another, of one archbishop instead of another, is unconstitutional on its face.

The edict of Milan issued in 313 A. D. by Constantine, the first Christian Emperor of the Roman Empire, granted

> "both to the Christians and to all others, free power of following whatever religion each may have pre-

ferred. * * * The absolute power is to be denied to no one to give himself either to the religion of the Christians, or to that religion which he thinks most suited to himself" (*Drozda* v. *Bassos*, 260 App. Div. 408, 411).

The majority denies churches in the State of New York a freedom of affiliation which even the Roman Emperors allowed.

The official name of the Eastern Church is "The Holy Orthodox Catholic Apostolic Eastern Church." The Russian Orthodox Church is an integral, though autocephalous, part of this Catholic and Apostolic Church. The traditional position of the Russian Orthodox Church is that it is apostolic in origin and descent, that this apostolic succession is preserved through the institution of its Ecclesiastical Hierarchy in an unbroken succession from Christ and His disciples, that its bishops have been consecrated by those duly qualified and duly authorized by Higher Authority to perform this sacrament, and that there must be no defect anywhere in the line of descent for the transmission of grace.

Many believe, and with reason, that the Metropolitan District lacks apostolic succession and has no canonical standing; indeed, the Patriarch has so ruled. The status of Metropolitan Theophilus as a bishop is in doubt for his consecration was not authorized or confirmed by higher authority as required by canon law (171-2, 176-7), and he is now under canonical suspension. That the Metropolitan District itself felt and still feels an inner insecurity on that score, is shown by the memorandum, self-serving though it is, prepared by Professor Feodotov and his associates (Defendant's Exhibit I, 1221-42). That is why, in the hope of joining the Universal Church and acquiring apostolic succession, the Metropolitan District had subjected itself to the Karlo-

vitz Synod, on the theory that that body was a canonical hierarchy; but even that gossamer link (if it ever existed) with Universal Orthodoxy is now broken (1224, 1226, 1229-30), and the Metropolitan District is again in a canonical void. In these circumstances, for the civil power to direct all Russian Orthodox churches to "recognize" and subject themselves to the "jurisdiction" of a bishop and a District whose canonicity, whose apostolic succession, they may hold in doubt, is a grave intrusion into that field of conscience which is protected by the Constitution and the elementary decencies as well.

The Constitutional Questions Presented By This Appeal Are Substantial

We thus see that the statute, as construed and applied, penetrates the field of religious liberty on a deeper and wider front than any legislation heretofore attempted. In the words of the dissenting judges, the statute (302 N. Y. 1, 39),

> "had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whole group and all its properties under the control of the new schismatic 'Russian Church of America', and, specifically, of mandating the ouster of the patriarchally appointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional."

It is wholly unprecedented. "No other decision reaching such a result can be found in the books" (302 N. Y. 1, 36).

The basic error of the Court of Appeals is its purported finding, which it characterized as "determinative" (302 N. Y. 1, 22), that the Patriarchal Church is not "free", is not "a true religious body" and is "a tool" of the Soviet Government, and its ascription of such a finding to the Legislature by "presumption" (302 N. Y. 1, 24-30).

This presents the fundamental issue whether such a finding furnishes constitutional justification for the suppression of the Patriarchal Church and this embraces the question whether such a finding may be ascribed to the Legislature by "presumption", and this, in turn, involves the question whether such a finding was properly made in the first instance.

1. Such a finding has no basis in fact and is wholly arbitrary.[7] This finding was made on the Court's own motion in defiance of contrary evidence in the record and the contrary findings of the Appellate Division (276 App. Div. 309, 319-20) which is the ultimate authority on the facts, and was beyond the jurisdictional competence of the Court of Appeals.[8] Thus Metropolitan Gregory testified without cross-examination that the Patriarchal Church functions freely as an Orthodox Church without interference by the civil authorities (832). Patriarch Sergius emphasized the "contradiction" between the Russian Church and the Bolshevik regime (1029-32). Appellee's canonical expert accepted as correct the Patriarch's assertion that the Russian

[7] In point of fact, appellee did not raise this issue at the trial and offered no evidence on the Point (766-7). It was imported for the first time into the case by the minority in the Appellate Division, as the majority in that Court pointed out (276 App. Div. 309, 319), and was later adopted by the majority in the Court of Appeals.

[8] With exceptions not material here, the Court of Appeals has no power to make independent findings of fact and is bound by the findings of the Appellate Division, where, as here, there is evidence to support them, and is limited to rulings on questions of law (Constitution of the State of New York, art. 6, sec. 7; New York Civil Practice Act, sec. 605).

Church had not been "led astray" from "its correct and canonical consciousness" (578-9). In 1946, the Metropolitan District itself resolved that "His" Beatitude Alexy, Patriarch of Moscow and all Russia be requested to continue us in his fold and be our spiritual head" conditioned upon retaining autonomy (1092).

This "determinative" finding is based on "judicial notice" (302 N. Y. 1, 23-24), in spite of the above contrary evidence and findings, and notwithstanding that a substantial body of informed and non-partisan opinion supports a different view. (See chapter on *"Religion in the Soviet Union"*, pp. 127-32, in House Document #754, published in 1946, prepared by the Library of Congress; Casey, *"Religion in Russia"*, pp. 178, 182-90, Harper & Bros., 1946; Bolshakoff, *"The Christian Church and the Soviet State"*, pp. 55, MacMillan & Co., 1942; Timasheff, (Professor at Fordham), *"The Great Retreat,"* pp. 227, 237, Dutton & Co., 1946; Anderson, *"People, Church and State in Modern Russia"*, pp. 214, 92-4, Harper & Bros., 1944. Mr. Anderson says that the Russian Church "desires to be and feels itself to be the Church of the Russian people, not the Church of the Soviet State" (pp. 214). Former Ambassador Smith, in his, *"My Three Years in Moscow"*, Harper & Bros., 1950, states "while the Communist party has been successful in retaining that which is Ceasar's, its direct efforts to capture also that which is God's, has been quietly but decisively rejected by the masses of the Russian people" (pp. 264-5). He also refers to the "mysterious power of religion in Russia which is impelled by forces and governed by laws of its own which not even the Kremlin understands" (p. 279, 264-5)).

In such a case, findings by use of judicial notice are improper (Morgan, *"Judicial Notice"*, 57 Harvard Law Review, 269, 292-3). Indeed it is doubtful that a claim that a

church is not "free", a matter involving questions of judgment, discretion and ecclesiastical policy, is an appropriate subject for judicial notice at all.

When is a church not free? Was the Papacy free in Avignon? Was the Catholic Church free under Mussolini? The Protestant Church under Hitler? Is the Catholic Church free in Spain? Was the Karlovitz Synod, which the Metropolitan District accepted as its higher church authority from 1936 to 1946, free when Hitler ruled Yugoslavia? Can any state church, like the Church of England, be free? In a theocracy does the state govern religion or religion the state?

Was the Russian Church free under the czars? The majority apparently think so, for they regard the archbishops of the American Archdiocese, appointed prior to 1917, as "in proper and direct canonical succession"—notwithstanding that they were appointed by the Czar (534). Under the Czar, the Russian Church was a state church, supported by state funds, governed by the Czar through his civil procurator (531-4). Yet the majority regard such a church as free, but not the present church, notwithstanding that church and state are now officially separated, that Patriarch Sergius emphasized the "contradiction" between the Soviet government and the Orthodox Church.

The assertion of the majority that in 1927 Patriarch Sergius promised to "secure * * * written pledges of loyalty (to the Soviet government) from the clergy abroad." (301 N. Y. 1, 15) is not sustained by the record and does not support the claim that the Patriarch is not "free". The Patriarch, we submit, was addressing the Russian clergy when in 1927 he spoke of "our sincere readiness to be law abiding citizens of the Soviet Union, loyal to its government . . ." (1029-32), at the same time emphasizing that "we

cannot be silent about the contradiction which exists between us Orthodox and the Communist Bolsheviks who govern our Union" (1030).

A student of church history will recognize this as a statement of the classic position of the church with respect to any political or economic system. It is in full harmony with the recent pronouncement of His Holiness, Pope Pius, wherein he said that the Church "does not meddle in problems purely political and economic, nor does she deign to pass judgment upon the usefulness or the harm of one form of government or another" (New York Times, Feb. 21, 1949, p. 3). The Patriarch had, at first, anathematized the revolution, but when the Soviets became the *de facto* government he could not reverse the verdict of history. All churches are—they must be—"loyal" to the Ceasar of the day, that is, the clergy must be law abiding citizens and not political revolutionaries; the Orthodox Christian will be "always and everywhere" exemplary citizens of "any" state "including that of the Soviets" (1030). We respectfully submit that this position is in full conformity with the Christian tradition and should not be criticized by this Court.

2. Nor can such a finding be ascribed to the legislature by "presumption". Apart from the fact that, as we have seen, a statute touching religious liberty cannot be saved by presumptions, the asserted presumption in the case at bar has no factual support whatever, is wholly arbitrary and capricious.

What was the attitude of the legislature toward the Patriarchal church in 1945 when Article 5-C was passed? On that point, we have no direct evidence from findings, declarations of policy or legislative hearings. However, we do know that in 1945 the World War had not yet terminated, that the United States and the Soviet Union were still allies, that not even the beginnings of the present tensions were

discernible, that, just two years before, in 1943, the legislature had by Article XV and section 5 of Article 2 of the Religious Corporations Law, chosen the Patriarchal church, to the exclusion of the Metropolitan District, as one of the four "primary" Orthodox jurisdictions in this state, that Governor Dewey had publicly acknowledged Metropolitan Benjamin, the present defendant, as "the living suecessor" of the traditional, accredited archbishops of the American Archdiocese, and that the Metropolitan District was then subject to the Karlovitz Synod, which was allied with Hitler.

No facts are presented—and history records none—showing that the legislature had reversed in 1945 the favorable opinion of the Patriarchal Church which it held in 1943.

3. But assuming that the legislature made such a finding with respect to the Patriarchate, could it constitutionally outlaw that Church for such a reason?

The implications of such a position are far reaching indeed.

Is it within the constitutional competence of the legislature to pass judgment on matters of this kind? Has the legislature the power to suppress a church because it disapproves of the "politics" of the chief Hierarch? Is not the minority in the Court of Appeals right in saying that a statute which purports to do this is unconstitutional beyond dispute?

Let us examine *American Communications Ass'n.* v. *Douds,* 339 U.S. 382, which is the *only* case cited by the majority in support of its constitutional position. Section 9 (h) of the Management Labor Relations Act, withheld the privileges of the Act from those unions whose officers failed to file with the Labor Board an affidavit to the effect that they were not members of the Communist party. Chief Justice Vinson, for the majority, stressed the fact that,

after investigations before committees of Congress, including the committee immediately concerned with labor legislation, it was established by a "great mass of material" and "substantial amounts of evidence", that Communist leaders of labor unions had fomented "political" strikes in interstate commerce, that it was the intention of Congress, expressed in the declaration of policy in the Act, to curb such political strikes and other kinds of *direct action* and that the remedy proposed by Section 9 (h) bore a reasonable relation to the evil which Congress sought to and had the power to curb, namely, obstructions to commerce by political strikes.

Holding that "beliefs are inviolate" (p. 393), the court further observed that Congress did not restrain the activities of the Communist party as a political organization, did not bar Communists from employment or membership in unions, did not "attempt to stifle belief" (p. 404), but only to prevent illegal *action* (p. 396); that the effect of the statute on the exercise of basic freedoms was indirect, conditional and partial (p. 399), was "relatively small", touching only a "relative handful of persons" (pp. 397, 404.) Indeed, under Section 9 (h) Communists can lawfully be *officers* of unions; the only penalty in such case being, that such unions may not enjoy the benefits of the Act.

Where in our case are the investigations, the hearings, the findings and declarations of policy, the "mass", the "substantial amounts" of evidence, showing that the Patriarchal church, sanctioned and approved in 1943, has become an evil in 1945, which the legislature sought to suppress? There is not a shred of evidence that the Patriarchal church had *done* anything in this state justifying its proscription or that the legislature ever intended anything even remotely resembling suppression.

The position of the majority is, we submit, based on pure speculation—on an unsupported "presumption" of a non-existing "finding" of an imaginary "evil."

Freedom of religion may not be thus struck down.

The Clear and Present Danger Rule

The "clear and present danger" rule applies to restrictions on religious liberty (*Cantwell* v. *Connecticut*, 310 U. S. 296, 311; *The West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639). Assuming that the Patriarchal Church is not "free," is not a "true religious body," is a "tool" of the Soviet Government, it does not follow that occupancy of St. Nicholas Cathedral by the Patriarchal Archbishop, in accordance with the canon law of the Russian Church, is a danger to the state, so grave and imminent, that the state may lawfully prevent such occupancy, thereby nullifying the canon law that requires it and "prohibiting the free exercise" of religion by the Patriarchal Church.

Surely the questions presented by this appeal are substantial.

We do not defend Communism. No lawyer, trained in the Western tradition, could possibly do so. But Communism is not the issue, as the minority opinion shows. *Service to the law is the issue.* Opposition to Communism is not a mandate to bend the law in the supposed interests of the moment. We must not, ourselves, use those methods we profess to loathe in others.

The attack by the majority upon the Patriarchal Church is not merely unjustified but, we submit, entirely misplaced. Here is an institution, by tradition and principle, orthodox and conservative, with roots deep in the past. The church is now officially separated from the State. It is the only traditional institution that has survived attack by the Soviet government; and that government has been compelled to come to terms with what seems to be an indestructible force.

The church "has not been led astray" (578). The pronouncement of Patriarch Sergius is explicit about the "contradiction" between the Orthodox Church and Soviet State, and reveals an independence of spirit which was never asserted under the Czars. Does it not serve our highest interests to preserve an institution of this character, rather than go out of our way and gratuitously rain blows upon it?

II. The Statute, as Construed and Applied by the Court of Appeals Is a Taking of Property Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution.

If, by force of the statute, the right to use the Cathedral is taken from the accredited archbishop of the Mother Church and given to another, there would also be a taking of *property* without due process of law. The Cathedral was built by and maintained by the Mother Church with its money for the use of its archbishop. From the very beginning it has so been used. The Mother Church has (apart from its religious and canonical interest) a vested *property* interest in the Cathedral, and its use by it and its Archbishop, as his *residence* and as the headquarters of the diocese. Extinction of that interest and denial of such use by statute or by judicial decision on common law grounds, would be an unconstitutional deprivation of a vested property right.

It is hardly necessary to cite authority to show that a legislature may not transfer property from one person to another. That has always been deemed contrary to the Constitution:

Ettor v. *Tacoma*, 228 U. S. 148;
Ochoa v. *Hernandez*, 230 U. S. 139;
Forbes Pioneer Boat Line v. *Everglades Drainage District*, 258 U. S. 338;
William Danzer Co. v. *Gulf R. R.*, 268 U. S. 633.

III. The Retroactive Application of the Statute to this Action, Which Was Already Pending When the Statute Was Passed, Violates the Due Process Clause of the Fourteenth Amendment.

The present ejectment suit was commenced on April 9th, 1945 (379-80). The statute took effect April 10th, 1945, one day after this action was begun. In other words, this was a "pending" action when Article 5-C became law.

The statute is not retroactive. It does not say it is. It does not purport to be. As construed, it does not affect mere procedure but fundamental rights, already vested before the statute became law. Retroactive application of such a statute violates due process. See:

Forbes Pioneer Boat Line v. *Everglades Drainage District*, 258 U. S. 338;
Ettor v. *City of Tacoma*, 228 U. S. 148.

IV. The Direction by the Court of Appeals that the Trial Court Exercise Its "Discretion" to Determine Whether Appellant Benjamin Is the "Proper" Person or "Trustee" to Occupy St. Nicholas Cathedral, Violates His Religious Freedom Guaranteed by the First and Fourteenth Amendments.

If plaintiff is entitled to the Cathedral by force of the statute and, if it is constitutional, the above argument becomes academic.

But even if the statute is *un*constitutional, the above disposition of the case on common law lines, violates the constitutional guarantee of religious liberty, and should be reversed by the Supreme Court of the United States.

The Court of Appeals ruled that, apart from the statute, the disposal of the case on common law lines would require reversal with a direction that the trial court "exercise its

discretion along the lines herein indicated," *i.e.*, "whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the Archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee"[9] to carry out "more . . . faithfully" the Cathedral trust (302 N. Y. 1, 24, 25).

Having already found that the Patriarchal Church was not "free," was not a "true religious body," etc., and having declined for that reason to follow *Watson* v. *Jones*, the direction that the trial court exercise its "discretion" in selecting the "proper" trustee, "along the lines herein indicated," is virtually a direction that Benjamin be rejected.[10]

But, be that as it may, and assuming the trial court had full discretion in the matter, such exercise of discretion would infringe on the guarantee of religious liberty. The Courts of New York are without power and have no discretion to determine who can function in the place of the canonically designated archbishop.

Under the canon law of the Russian Church, the appointed archbishop must occupy St. Nicholas Cathedral. If the civil courts, by the exercise of discretion or otherwise, bar such occupancy they interfere with religious liberty and violate the constitutional guarantee and the principles of *Watson* v. *Jones*.

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[9] Benjamin does not claim to be a "trustee" of the Cathedral. Plaintiff corporation, holding the legal title, is the "trustee". Benjamin claims to be the canonical beneficiary of the Cathedral trust. The Court of Appeals converts Benjamin from a beneficiary entitled to protection into an involuntary trustee subject to removal.

[10] The remission of the case to the trial court for the exercise of its "discretion" was a necessary formality since the Court of Appeals has no power to exercise discretion, but must rule on questions of law only.

Judicial decisions, no less than legislative, and executive acts must comply with the due process provisions of the Constitution.

Shelley v. *Kraemer*, 334 U. S. 1;
Backus v. *Fort Street Union Depot*, 169 U. S. 557;
Brinkerhoff v. *Hill*, 281 U. S. 673;
Chicago, B. & O. R. R. Co. v. *Chicago*, 166 U. S. 226.

V. The Failure and Refusal of the Court of Appeals to Rule on the Merits of the Defense of Limitations of Appellant Benjamin While Directing Final Judgment Against Him Is a Denial of Due Process of Law and Equal Protection of the Laws in Violation of the Fourteenth Amendment to the United States Constitution.

Even if the statute be held not to violate the guarantees of religious liberty, the above contention remains valid.

Appellant pleaded the applicable statute of limitations as an affirmative defense. (9-10). Under New York law, (New York Civil Practice Act, Sec. 34) the 15 year limitation applies to ejectment actions. Title to the Cathedral was transferred to plaintiff on April 17th, 1925 (1012). Its possession terminated April 2nd, 1926 (105-6, 163, 964-5). This action was commenced April 9th, 1945 (379-80). Hence, the defense is valid on its face and this action is barred.

At the trial (381-4, 388-95, 479-88, 940-1005, 1243-50, 1278-9) and on their appeal to the Appellate Division and the Court of Appeals (where the parties devoted many pages of their brief to this issue), plaintiff's *sole* contention was that the statute had been tolled, i. e. the "commencement" of this action in ejectment had been "staged" (New York Civil Practice Act, Sec. 24) by two injunctions; the permanent injunction in favor of Kedrovsky and against the two individual defendants in the *Kedrovsky* case, *supra*,

issued in 1926 and an alleged *temporary* injunction, dated July 1st, 1926, which it was claimed was granted in an action, based on said permanent injunction (968, 1247-8) by Kedrovsky as Archbishop against plaintiff (940-5, 100, 382-4). An unsigned, undated copy of this temporary injunction (940-5) was *excluded* by the trial court (480-1, 488); and, by means of an affidavit of plaintiff's counsel after the trial, plaintiff attempted to establish that such an injunction was issued and to reconstruct its terms (958-1002, 1278-9, 1243-50).

Appellant Benjamin contended at the trial and on both appeals, and on the motion for reargument, that these injunctions did not toll the statute.

Thus, plaintiff was not a party to the *Kedrovsky* case and the injunction there did not run against it (884-7). In any event, it enjoined only *physical* interference with Kedrovsky's possession of the Cathedral and did not, as plaintiff admitted (964-7), bar commencement of summary proceedings against Kedrovsky himself to recover possession of the Cathedral (1247-8). Similarly it did not "stay" the "commencement" of the ejectment action, i. e., service of a summons and complaint.

The alleged, excluded *temporary* injunction was, if issued, conditioned on an early trial (944, 73) and terminated when the main action lapsed (382). It also enjoined only physical interference (968-70, 1247-8), and, if it existed in the form asserted (940-5), it did not bar an ejectment action.

The trial court, the Appellate Division, and the minority in the Court of Appeals did not pass on the defense of limitations, but since they ruled in Appellant Benjamin's favor, it was unnecessary to do so. But when the Court of Appeals rendered final judgment *against* this appellant, it was bound to pass on this defense on the merits and its failure to do so in the original decision, and its refusal to

do so on the motion for reargument, which specifically requested a ruling on this issue, is a denial of due process.

The Court of Appeals thus summarily dismissed appellant Benjamin's defense of limitations: (302 N.Y. 1, 21)

> "Only the first (defense) need concern us here. The second, third and fourth defenses, i.e.: nonuser and lack of authority in plaintiff, the statute of limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor. There was little or no discussion concerning them and they have been effectively eliminated from the case."

The above statement flatly contradicts the indisputable facts as to the defense of limitations. This defense was *not* "ignored, abandoned or found in plaintiff's favor". It was pleaded, it was litigated at trial, it was pressed on the appeals to the Appellate Division and the Court of Appeals and on the motion for reargument and the quoted statement of the majority opinion is plainly mistaken.

The defense of limitations is favored as a statute of repose (*Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314).

Failure or refusal to pass on a properly raised defense, deprives a defendant of a fair hearing, it denies him the right to defend, and thus denies him due process of law. In analagous cases it was deemed a denial of due process to deprive a party in a civil action of representation by counsel of his choice (*Roberts* v. *Anderson*, 66 Fed. (2d) 874, 6; cf. *Cooke* v. *U. S.*, 267 U. S. 517, 537 and *Powell* v. *Alabama*, 287 U. S. 45), or even, under certain circumstances, to bar oral argument at a hearing (*Federal Communications Commission* v. *W J R*, 337 U. S. 265, 273-7).

If the Court's refusal to rule on the defense of limitations is based on the theory that the statute prevented the assertion of such defense, then the statute clearly denies due process. While it has been repeatedly held that a legisla-

ture may deprive litigants of the defense of limitations (*Campbell* v. *Holt*, 115 U. S. 620; *Chase Sec. Corp.* v. *Donaldson*, 325 U. S. 304), the cases which so hold recognize that the rule is different where, as here, rights in property have become vested by lapse of time. And this Court so held in *Stewart* v. *Keyes*, 295 U. S. 403. Besides, no court has ever suggested that it would be consonant with due process to deprive a particular individual of the right to plead limitations, yet preserve that right to all others. So it is not possible to uphold a construction of the statute which would here nullify the defense that was pleaded.

Respectfully submitted,

PHILIP ADLER,
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PHILIP ADLER,
EDWARD M. GARLOCK,
Of Counsel.

EXHIBIT A

ARTICLE 5-C (New)

Russian Orthodox Churches

Sec.

105. Definitions.
106. Incorporation of Russian Orthodox churches.
107. Government of incorporated Russian Orthodox churches; powers and duties of trustees.
108. Reincorporation of existing corporations.

Article added by L. 1945, c. 693, eff. April 10, 1945.

§ 105. Definitions

The "Russian Church in America", *as that term is used anywhere in this article, refers* (is) to that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which were known as (a) Russian American Mission of the Russian Orthodox Church from in or about seventeen hundred ninety-three to in or about eighteen hundred seventy; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about eighteen hundred seventy to in or about nineteen hundred four; (c) Diocese of North America and (Alaska) *the Aleutian Islands (or Alaska)* of the Russian Orthodox Church from in or about nineteen hundred four to in or about nineteen hundred twenty-four; and (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the *administrative* jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an *administratively* autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held in Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four.

A "Russian Orthodox church", *as that term is used anywhere in this article,* is a church, cathedral, chaptel, congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of *said mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711, § 1, eff. March 31, 1948.

§ 106. Incorporation of Russian Orthodox Churches

An unincorporated Russian Orthodox church in this state may be incorporated by executing, acknowledging and filing a certificate of incorporation, stating the corporate name by which such church shall be known and the county, town, city or village where its principal place of worship is or is intended to be located. There shall be attached to such certificate the permission to incorporate signed by the metropolitan archbishop or other primate or hierarch of the Russian Church in America, or by the locum tenens acting in his place. Such certificate of incorporation shall be executed and acknowledged by six lay members of such church.

On filing such certificate such church shall be a corporation by the name stated in the certificate. Added L. 1945, c. 693, eff. April 10, 1945.

§ 107. Government of incorporated Russian Orthodox (Church) *churches;* powers and duties of trustees

1. Every Russian Orthodox church in this state, whether (heretofore or hereafter) incorporated *before or after the creation of said autonomous metropolitan district,* and whether incorporated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law, shall recognize and be and remain subject to the jurisdiction and authority of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities of the Russian Church in America, pursuant to the statutes

for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church).

2. The six lay members of every church incorporated pursuant to this article signing the certificate of incorporation and the rector shall be the trustees of such church for the first year or until their successors are selected according to the by-laws of such church or the rules and usages of the Russian Church in America.

3. The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom and shall administer the same in accordance with the by-laws of such church, the normal statutes for parishes of the Russian Church in America approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November twentieth to twenty-third, nineteen hundred thirty-four and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. Added L. 1945, c. 693; amended L. 1948, c. 711 § 2, eff. March 31, 1948.

§ 108. Reincorporation of existing corporations

Any heretofore incorporated Russian Orthodox church may reincorporate under the provisions of this article, by filing in the office of the county clerk in the county in which its principal place of worship is located, a certificate, signed by the trustees in office at the time of such reincorporation, or by the majority of them, setting forth that they desire to reincorporate under the provisions of this article, the corporate name by which such church shall be known, the county, town, city or village where its principal place

of worship is located and the number and the names of the trustees who are to hold office until the next annual meeting of said church. Immediately upon the filing of such certificate all the right, title, equity and interest of such church in any estate, real or personal, together with all franchise and charter rights, shall be vested in the body corporate and politic so created under this article and the original incorporation of such church shall be null and void. Added L. 1945, c. 693, eff. April 10, 1945.

Explanation—The amendment of 1948 added the words that are underscored and omitted the words in parenthesis.

EXHIBIT B

NOT FOR PUBLICATION

SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents.

Decided November 30, 1950.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the first judicial department, entered January 25, 1950, affirming, by a divided court, a judgment of the Supreme Court in favor of defendants, entered in New York County upon a dismissal of the complaint by the Court at a Trial Term (BOTEIN, J.; opinion 192 Misc. 327) without a jury, at the close of the entire case.

RALPH MONTGOMERY ARKUSH for appellant.

PHILIP ADLER for respondents.

CONWAY, J. In 1903, a church was built at 15 East 97th Street in New York City, title to which was held by a corporation, created in 1899 under the Religious Corporations Law of this State and named "Russian Orthodox St.

Nicholas Church in New York". The church was constructed with funds supplied partly from abroad and partly from local contributions and it was dedicated to the use of the members of the local congregation of the Russian Orthodox Church in New York City established in 1893. Two years later in 1905, the See of the Russian Orthodox Diocese of North America and the Aleutian Islands was transferred from San Francisco to New York and St. Nicholas Church became a cathedral occupied by the ruling bishop of the North American Diocese and dedicated to the use of all the members of the diocese as a central place of worship of the Russian Orthodox Church in North America. This cathedral is the subject of the present controversy. Simply stated, it is our duty in this action to identify the true and proper beneficiaries at the present time of such dedication of the cathedral so that there may be proper administration of this religious trust. In a roaching that task, it is vital to our inquiry that we unde. stand the history and organization of the Russian Orthodox Church, and the origins of its difficulties in modern times as disclosed in the record here and the record in *Kedrovsky v. Rojdesvensky* (242 N. Y. 547), which was submitted to us upon the argument.

The Russian Orthodox Church is one of that loosely knit group which generically is referred to as the Eastern Confession or the Eastern Orthodox Church—an allusion to the rupture of the eastern and western portions of the Catholic church in 1054. The Russian church originally was subject to the Patriarch of Constantinople but acquired greater autonomy when Constantinople fell to the Turks and the Metropolitan of Moscow was no longer appointed by the Patriarch of Constantinople but was elected by the Russian bishops. Finally, express recognition of the "autocephaly", i.e., the complete independence, of the Russian church came in the 16th century when the Metropolitan of Moscow was raised to the dignity of Patriarch. The Patriarch ruled the church until 1700 when Peter the Great forbade the election of a new Patriarch and established the Most Sacred Governing Synod, consisting of a Procurator appointed by the Czar, and several metropolitans and bishops, to govern the church in place of the Patriarch. This form

of church government continued for over two hundred years, until 1917.

During that period, the Russian Orthodox Church conducted missionary activities in many parts of the world. A mission was established in 1793 in the then Russian territory of Alaska, and spread down the Pacific coast. In 1870, the mission had grown to the extent that the Diocese of Alaska and the Aleutian Islands was created, with its See at San Francisco. Since it extended from Alaska through Canada to San Francisco, we shall refer to it herein as the North American Diocese or as the diocese.

A New York City congregation of the Russian Orthodox Church was established in 1893, incorporated in 1899, as already noted, and completed St. Nicholas Church in 1903. In 1905, when the See of the diocese was moved from San Francisco to New York, the church became a cathedral, occupied, in accordance with the rules of the church, by the ruling bishop of the diocese. Throughout that period, the paramount jurisdiction of the Most Sacred Governing Synod in Russia over the North American Diocese was recognized and unquestioned.

Such was the condition of the Russian Orthodox Church and its North American Diocese until 1917—the year of the Kerensky revolution in Russia.

Following the overthrow of the czarist regime, a great "Sobor" or convention of the Russian Orthodox Church was called. This sobor of 1917-18, it is conceded here by all parties, had indisputable canonicity and validity. The sobor re-established the Patriarchate and elected thereto Patriarch Tikhon, the "arch-prelate" and "head of Church Administration", the first such since Peter the Great. The Patriarch, as the head of the Sacred Synod and of the Supreme Church Council, constituted the Supreme Church Authority and ruled the Russian Orthodox Church. Other enactments of the sobor provided a procedure for the local election of diocesan bishops and the confirmation of such election by the Supreme Church Authority. It also provided that the Patriarch might call a sobor every three years and that he should preside over it. No sobor was

ever called by Patriarch Tikhon (and he was the only one with power to do so) prior to his death in 1925.

Up to 1917, the ruling archbishop of the diocese had been appointed by the central church authorities. Tikhon himself, later to be Patriarch, was the diocesan archbishop from 1904 to 1907. Archbishop Platon succeeded him and ruled until 1914 when he returned to Russia and Archbishop Evdokim came in his stead. Archbishop Evdokim remained until 1917 when he too returned to Russia. All three duly appointed archbishops, in conformity with the rules of the Russian church, used and occupied St. Nicholas Cathedral, as their administrative headquarters and as a place of worship. Those three archbishops were in proper and direct canonical succession and as to that there is no controversy.

Archbishop Evdokim's departure in 1917 marked the beginning of the difficulties which have ever since beset the diocese. No discussion of the Russian Orthodox Church since 1917 is possible without constant reference to the political conditions upon which its character and its existence depended. In March of 1917, the Provisional Government of Kerensky replaced the czarist regime. The Kerensky Government itself was soon overthrown by the so-called Bolsheviki led by Lenin in the famous "October Revolution". Prior to his downfall, Kerensky, as noted, had authorized the convocation of the great sobor of the Russian Orthodox Church, which was in session through the latter part of 1917 and up to February of 1918 and which named Tikhon as Patriarch. Upon their accession to power, the Bolsheviki, in accordance with the then acknowledged and asserted principles of communism, attempted by every means at their command, to destroy religion in Russia. In the years following 1917, church property was confiscated, clergymen were killed, exiled or imprisoned, and Patriarch Tikhon himself, old and in poor health but a useful symbol, too valuable to be destroyed, was confined under house arrest and later imprisoned.

This frontal attack upon the church continued for five years. In November of 1920, however, at the height of the persecution, Patriarch Tikhon issued his now famous ukase No. 362 of 1920. This document contained "instructions to

the Diocesan Bishops for the case that a given Diocese be severed from the highest Church Administration, *or in case the latter's activity stop*". (Emphasis supplied.) It was provided in part that "if the highest Church administration * * * would for any reason discontinue their church-administrative activity", the diocesan bishop, either with the bishops of neighboring dioceses or, if that were not possible alone, should "assume the full hierarchical power" and "do everything possible to regulate the local church life, and if necessary, * * * organize the diocesan administration suitable to conditions created". Other paragraphs provided for the continuation of such local administration of the church if the discontinuance of activity of the highest church administration "should acquire a protracted or even permanent character". Finally, it was provided that "all measures taken locally in accordance with the present instructions * * * must be submitted for confirmation later to the Central Church Authority when it is re-established."

The apparent forebodings of Patriarch Tikhon, which prompted this ukase, proved accurate, for in the Spring of 1922 he was arrested and imprisoned. The Russian Government, then, for its own purposes, as later became evident, permitted a group of priests to visit Tikhon and they procured from him a letter authorizing the transfer of certain *business papers* of the church to a named archbishop (Agathangel) who was to be his representative. Instead of doing that, the recipients of the letter—members of a radical group styling themselves the "Living" or "Renovated" church—declared themselves to be the Supreme Authority of the Russian Orthodox Church and purported to authorize and summon the pseudo-sobor of 1923. Patriarch Tikhon later referred to them as "ambitious and willful men" who took advantage of the situation "to usurp the highest clerical power of the Russian Orthodox Church which did not belong to them," and he denounced their statements as "nothing but lies and deception". It is now conceded here that this was a schism which is now extinct. Nevertheless, while Tikhon was still in prison, this schismatic group purported to call another sobor of the church although power so to do resided only in the Patriarch

Tikhon, as we have seen. There is evidence that they were aided and abetted in their plan by the Russian Government which permitted them to proceed while killing, arresting or exiling those members of the church who objected. This new pseudo-sobor met in 1923.[11] Tikhon was roundly and vehemently condemned by all the speakers. The patriarchate was dissolved and Tikhon, reviled and denounced as an apostate and traitor, was unfrocked. The church created by the pseudo-sabor of 1923 was called the "Living Church" or the "Renovated Church". It was schismatic and had no canonical validity. That fact, it should again be noted, is conceded by all the interested parties here.

The turmoil and the turbulence with which the Russian Orthodox Church was beset in Russia was not without its echoes in this country. Bishop Alexander of Canada became acting head of the diocese by designation of Archbishop Evdokim (see p. 3, herein). Several conventions were held in this country at which the status and fate of the North American Diocese were discussed and measures were proposed to preserve it from disintegration or the usurpation of pretenders. Archbishop Platon, who had ruled the diocese from 1907 to 1914, in proper canonical succession, returned to this country in 1921. He succeeded in restoring peace and order in the diocese, and prominent churchmen of the diocese urgently petitioned Patriarch Tikhon to reappoint him formally as archbishop of the diocese. This was just before Tikhon was actually imprisoned. While he was technically at liberty, his visitors

[11] The minutes of its deliberations contain frequent obsequious expressions of praise of and devotion to the Soviet Government. Lenin was referred to as "the world's leader" and the Soviet Government was said to be "the only one in the world of all time of the existence of mankind, to fight actually for good and equality." A resolution was adopted which declared that the world was divided into two classes—the capitalist exploiters and the proletariat—and continued: "The Christians cannot be indifferent spectators of that battle. The Sobor declares capitalism to be a mortal sin, and a battle with capitalism to be holy to Christians. In Soviet Authorities the Sobor sees a world's leader for fraternity, equality and peace of nations. The Sobor stigmatizes the international and national counter-revolution and condemns it with all its religious and moral authority". Christians "through the entire world" were called upon to "bring into life the principles of the October Revolution."

in Moscow were being watched and interrogated carefully, and his correspondence, especially with Americans, was systematically searched. The American entreaties regarding Archbishop Platon were relayed to the Patriarch by a representative of the Y. M. C. A. who was in Moscow. The Patriarch, in the presence of another witness, Bishop Pashhovsky, assured him that Platon would be appointed the ruling bishop of the diocese and that he would issue papers to that effect. The Patriarch asked that Platon be notified immediately, but it was agreed that it would not be possible at that moment to put the appointment in writing because of the constant surveillance of the civil authorities and the fear that any such communication, if seized, would endanger the safety or the life of the Patriarch. The Patriarch's intention and will were transmitted to Archbishop Platon by the Y. M. C. A. representative and Bishop Pashhovsky. Alexander, the acting Archbishop, recognized in writing Platon's appointment as ruling bishop of the diocese, as did the bishops of the church outside Russia. Tikhon was imprisoned by the Soviet Government immediately after making this oral appointment. A diocesan convention was held at Pittsburgh in October, 1922, and after investigating the situation Platon was acknowledged as the ruling bishop. Platon accordingly took possession of St. Nicholas Cathedral and exercised administrative supervision over the diocese.

Patriarch Tikhon was released from prison in the latter part of 1923, after the pseudo-sobor of that year had completed its work. Under date of September 20, 1923, from a monastery, he signed an order directed to Platon advising him that, *with the concurrence of the Sacred Synod*, "having taken cognizance of the situation of the American Church, we deemed it necessary to appoint you to rule the North American Church."

Meanwhile, one John Kedrovsky, a priest of the Russian Orthodox Church in this country, had, in 1918, commenced an action in this State on behalf of himself and other priests against the association or corporation known as the Archbishop and Consistory, which was a managing and advisory group handling the affairs of the diocese. In that complaint

Kedrovsky asserted that he was one of the clergy of the Russian Orthodox Greek Catholic Church of North America; that it was a religious denomination of about 300 churches with about 300,000 members organized in various unincorporated parishes or bodies throughout North America;[12] that his lawful archbishop was Archbishop Evdokim (Meschersky) who had departed from the United States for Russia about August 6, 1917, and had since remained there; that Alexander (Nemolovsky) was then a bishop of the church in Canada and had been assuming to act as the acting archbishop of the church pursuant to a cablegram from the lawful Archbishop Evdokim but that in truth no such appointment had been made by Archbishop Evdokim and that Alexander was therefore a usurper.

After the institution of that action, but before trial, the aforementioned psuedo-sobor of 1923 was held in Moscow. It created the "Living Church" or "Renovated Church", which, as noted, is now conceded to have been schismatic and uncanonical. Kedrovsky, the same priest who in his 1918 action had asserted that he was subject to Archbishop Evdokim as the true archbishop of the North American Diocese, procured from this "Renovated Church" certain credentials in the latter part of 1923. One document purported to consecrate him as North American archbishop and to excommunicate and condemn Archbishop Platon. The other documents contained Kedrovsky's formal appointment as archbishop of the North American Diocese and a full power of attorney to act for the church.

In March, 1924, he commenced another action, this time asserting that he was the lawful archbishop of the North American Diocese, in order to gain control of St. Nicholas Cathedral, the subject premises in the case at bar, which he then conceded had been possessed by Bishop Alexander in 1919 "as the de facto or acting Archbishop". As noted, Archbishop Platon was occupying the cathedral in 1924 by

[12] On the trial, he introduced in evidence an exhibit which listed deeds of 135 church properties to Bishop Alexander in Alabama, Alaska, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Texas, Washington and Wisconsin.

virtue of his oral appointment by Patriarch Tikhon and the written confirmation thereof in September, 1923.

In March of 1924, immediately prior to the institution of the cathedral action by Kedrovsky, a document, dated February 16, 1924, appeared in the newspapers here purporting to have been issued by the Patriarch Tikhon accusing Platon of engaging "in Public acts of Counter-Revolution directed against the Soviet Power and of disastrous consequences to the Orthodox Church". It provided for the dismissal of Platon "from the day on which this Present Decision is announced to him", by a new ruling bishop who was to be chosen. The publication of this decree, dated less than five months after the patriarchal order confirming Platon and the legal action instituted by Kedrovsky, caused bewilderment among the members of the diocese. A North American sobor was called and held at Detroit in April of 1924 to consider the situation, excerpts from the minutes of which appear in the record.[13]

It was pointed out that the North American Diocese, for a good many years, had been "cut off from the highest

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[13] The purported new order of the Patriarch was compared with his recent decree confirming Archbishop Platon, the language of the new order was analyzed and found to be couched in terms similar to those used by the schismatic Kedrovsky, and there were comments upon the very serious condition of the Patriarch's health. (He did, in fact, die the next year, in April of 1925.) It was concluded that "somebody in Moscow is extracting decrees from the sick Patriarch and is using those decrees against him", and in particular that the decree of February 1924, was "undoubtedly forced by the Soviet power". Another speaker stated: "The fact that the Soviet power still tolerates Patriarch Tikhon is only because he is an achievable means of influencing opinion at home and public opinion abroad. I have not the slightest doubt that all the Patriarch now does to administer the Patriarchate he is doing under duress. Over there it is done very simply: he is summoned to the respective commissariat and presented with decrees prepared beforehand which he is 'to execute'. As everything is done to 'consolidate the conquests of the revolution' his refusal to comply with the demands of the Soviet power will be openly called counter-revolution and sabotage." It was said that if such forced acts of the Patriarch continued, the North American Diocese would be subject to "all kinds of surprises, which could basically undermine that church order and

organ of the administration of the Russian Church" and that that situation made operative the above-quoted ukase of 1920 providing for local administration and election of bishops. The sobor then adopted resolutions asking Platon to head the administration of the church. Another resolution emphatically stated it to be the will of the sobor "not to break at all the spiritual ties and communion with the Russian Church but always to pray for her good". The "final regulation" of the status of the North American church was to be left to "a future Sobor of the Russian Orthodox Church which will be legally convoked, legally elected, will sit with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority of its decisions for the entire Church, and will be recognized by the entire Oecumenical Orthodox Church as a true Sobor of the Russian Orthodox Church."

The second or 1924 action brought by John S. Kedrovsky reached us two years before the 1918 action brought by him. In that 1924 action there was evidence as to most of the facts already detailed. However it was not there conceded as it is now that the "Renovated Church" had been schismatic in origin and had been later absorbed by or merged with the patriarchal church, nor that the 1923 sobor was not considered as having complied with canonical requirements because it was not convened pursuant to a call by the Patriarch and the Holy Synod. Moreover, in that action there was not before the court ukase No. 362 of 1920 of Patriarch Tikhon. The Appellate Division (214 App. Div. 483) stated that "The validity of Kedrovsky's appointment really depends upon the validity of the second Sobor [that of 1923] as it is called." (P. 487). It then found (contrary to what is now conceded to be the fact) that the sobor was properly called and that the "Renovated

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peace which have, with such great labor, already been practically arranged" by Archbishop Platon, and "would involve our Church here in a condition of that same anarchy under the banner of which church life in Russia exists at present * * * We must create our own firm Church administration, completely insured against possibility of the direct or indirect influence of the Soviet Power."

Church", created by it, had the power to appoint Kedrovsky as the ruling bishop of the North American Diocese. When the appeal from that decision reached us we treated it as one involving only questions of fact as to whether (1) there was a governing body of the church and whether (2) that governing body had recognized Kedrovsky as archbishop of the church. We determined that there was evidence to sustain the findings of the Appellate Division on both of those points. We thereupon affirmed the judgment, one Associate Judge being recorded as absent. (*Kedrovsky* v. *Rojdesvensky* [1926], 242 N. Y. 547.) The control of all phases of Russian life by the Government was not as apparent in 1924 as it is a quarter of a century later and on the surface, at least, the case appeared to be a proper one for the application of the rule that in an ecclesiastical dispute involving a denominational church, the decision of the highest church judicatories will be accepted as final and conclusive by the civil courts (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church,* 222 N. Y. 305, 315; *Watson* v. *Jones,* 13 Wall. [U. S.], 679, 724-727; Religious Corporations Law, §§ 4, 5).

Two years later there was presented the original or 1918 action commenced by Kedrovsky, as a priest of the patriarchal church, on behalf of himself and all others similarly situated. It had been brought against the "Archbishop and Consistory of the Russian Orthodox Greek Catholic Church, alleged corporation", and others. Archbishop Platon (Rojdesvensky) was again an appellant. In that action a receiver *pendente lite* had been appointed and the judgment at Special Term directed that the defendant Platon and other defendants deliver over to such receiver, who in turn was directed to deliver to plaintiff John S. Kedrovsky, all the properties and deeds thereto held by Bishop Alexander and conveyed by him to the general board of trustees by the exhibit dated June 7, 1921, which listed and enumerated all of the 135 church properties in the nineteen States and the territory of Alaska heretofore referred to. That judgment was unanimously affirmed by the Appellate Division. We, however, granted leave to appeal. The decision of the Appellate Division there was correct and

unassailable if by our affirmance in *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), we had adopted the view that the properties of the North American Diocese were required to be administered by an appointee of the central authorities of the patriarchal church as it then existed in Russia, whatever the status and characteristics of the church there might be, and that Kedrovsky had been validly appointed by such authorities. We, however, declined so to consider our earlier affirmance in the cathedral case two years before. Realizing that the legitimate claims of the North American Diocese, whose temporary autonomy had but recently been declared, were entitled to consideration under the circumstances disclosed, we unanimously reversed the judgments below. (*Kedrovsky* v. *Russian Catholic Church* [1928], 249 N. Y. 75.)

We pointed out that the title to the properties "was either in Archbishop Nemolovsky [Alexander] for the benefit of the faithful of the church within his diocese, or in the defendants [Platon and the general board of trustees] to whom he attempted to transfer his trusts * * *, or in the faithful of the church themselves." (p. 77.) We further noted that in none of those views was title in the members of the Consistory, then headed by Kedrovsky. Then, taking cognizance of the doubt as to Kedrovsky's status as archbishop by appointment of the "Renovated Church", and of the declaration of administrative autonomy by the American church at Detroit in 1924, we said (pp. 77-78): "In view of the dissensions that have arisen, the Supreme Court may well conclude that the title should be vested in some other trustee who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114). Whether such trustee should be the plaintiff, who is the present Archbishop, or the incorporated Archbishop and Consistory, or some one else, we do not now determine. This question is one to be passed upon by the Supreme Court in its discretionary supervision of the conduct of trustees. That discretion has not been exercised by any judgment yet pronounced. * * *"

That 1928 decision by this court thus recognized that

the difficulties of the Russian Orthodox Church in this country differed substantially from the situations presented in the *Westminster* and *Watson* cases (*supra*), and that those cases were not helpful in the solution of the problem. The problem, indeed, was one which strained the limits of judicial power, and, we deemed it proper to return the case to the Supreme Court leaving it to that court, after full consideration of the facts, in the exercise of its discretionary power, to achieve a result whereby the faithful of the Russian Orthodox Church in this country might enjoy their accustomed religious temporalities under the supervision of trustees who might "be relied upon to carry out more effectively and faithfully the purposes of this religious trust".

While this litigation was in progress, the Soviet sponsored "Renovated Church" was the only one permitted to function in Russia, the central office of the patriarchal church being suppressed by the Government. Despite this State assistance, the "Renovated Church" had no popular following and few adherents outside its own clergy. In a few years it joined with and was absorbed by the patriarchal church. For two years, after Tikhon's death in 1925, there was no Patriarch of the Russian Orthodox Church. Then in 1927, one Sergius, the Metropolitan of Moscow, made peace with the Soviet Government and concluded an agreement with it under which the central office of that church was permitted to reopen, after acknowledging its "loyalty" to the Government and promising to secure similar written pledges of loyalty from the clergy of the church abroad. No election to fill the office of Patriarch was permitted. Instead, Sergius was appointed the acting *locum tenens* of the patriarchal throne. Unsuccessful discussions subsequently ensued with a view toward reuniting the North American metropolitan district with the patriarchal church.[14]

Under the leadership of Metropolitan Platon following the creation of the administratively autonomous metropol-

[14] The position of the Russian church in America appears to have been that no such pledge of loyalty to the Russian Government as demanded could be given by the clergy here and that the church in Russia was be-

itan district by the Detroit sobor of 1924, to which reference will be made hereafter, the church grew and prospered. With the exception of schismatics such as Kedrovsky, who was recognized by no one but who occupied St. Nicholas Cathedral by virtue of the decision and injunction of 1924, the North American church followed Metropolitan Platon. In 1933, the Acting *Locum Tenens*, Sergius, dispatched one Benjamin (Fedchenkoff) to the United States in order to take over the administration of the metropolitan district from Platon, whose proclamation of autonomy was declared to be "null and void". Sergius also purported to excommunicate Platon and all the clergy and laymen who followed him, until they submitted themselves to the jurisdiction of the patriarchal Exarch Benjamin (in America) or directly to the Acting *Locum Tenens* (in Moscow). Finally in 1934, Sergius appointed his ambasador, Benjamin, as "permanent Ruling Bishop of the Russian North American Diocese". The text of the order contains a recital that Benjamin had "organized in New York a Diocesan Council and that our *North American Diocese has begun official existence*". This would appear to be a significant admission that the former North American Diocese, which had by that time become a metropolitan district, had achieved practical administrative autonomy and that it was necessary for the Russian church to organize a new diocese. By 1945, the number of parishes which recognized the new diocese set up by Benjamin in 1934, and which we must assume, in view of the provisions of the Religious Corporations Law since 1875, were organized for the purpose of adhering to such new diocese set up by Benjamin, was only 13, while those adhering to the autonomous metropolitan district were said to total 358.

Platon died in 1934 and another sobor of the American church convened at Cleveland. Bishop Theophilus (Pashkovsky) was elected as ruling bishop and has served as such since. The temporary autonomy of the North Amer-

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coming a slave to the atheistic Russian Government and was aiding it in its fight against all religion. In view of those conditions, the Russian church here felt it had no alternative but to insist upon temporary autonomy envisaged by the ukase No. 362 of 1920.

ican metropolitan district created in 1924 was re-affirmed, and rules for the administration of parishes were adopted. Another sobor at New York in 1937 again confirmed the temporary autonomy of the North American metropolitan district. The central church authorities in Moscow immediately issued a decree suspending and excommunicating Bishop Theophilus.

In 1934, John S. Kedrovsky, the schismatic, also died, but his son, Nicholas, continued to occupy the St. Nicholas Cathedral, even though by that time the "Renovated Church" had ceased to exist. Nicholas remained there until 1944, when he too died, and possession of the cathedral passed informally to his brother, John, who claimed to be a priest by virtue of an ordination of the "Renovated Church".

In 1940, the status of the metropolitanate again came before this court in *Waipá* v. *Kushwara* (259 App. Div. 843, motion for leave to appeal denied 283 N. Y. 780). That was a suit to oust a priest from a Russian Orthodox Church in Yonkers, N. Y. He had been suspended by Archbishop Theophilus of the metropolitan district and in the civil action brought against him, he defended on the ground, among others, that Benjamin, the appointee of the Moscow Patriarchate and not Archbishop Theophilus, the elected metropolitan, had the power and authority to administer the affairs of the church here. The lower courts rejected that contention, finding authority for the creation of the administrative autonomous metropolitan district in the ukase of 1920 of Patriarch Tikhon which was to continue "until such time as the existing civil authorities * * * would cease interfering with the church". (N. Y. L. J., Jan. 6, 1940, p. 97, col. 5.) We denied leave to appeal.

Following the invasion of Russia by Germany in 1941, the Soviet Government, fighting for survival, apparently found it expedient to permit a somewhat broadened area of activity to the Russian Orthodox Church in that country. Then, following the death of Sergius in 1944, it consented to the convening of a sobor at Moscow in January of 1945. The news which was permitted to seep out of Russia after 1941 encouraged the hope in the mem-

bers of the metropolitan district that unity might again be found.[15]

Suddenly, without advance notice, an invitation was received for the North American church to be represented at the new sobor in Moscow. Four delegates were hurriedly chosen—three clergymen and one layman, the attorney for the church—who made preparations to travel to Alaska, from which place the Russian Government was to provide transportation to Moscow. After two of the clergymen had started, the Soviet Government cancelled the visa of the attorney on the pretext that entry was permitted only to clerical persons—a restriction which was not observed with reference to the delegation from Yugoslavia. The two clergymen who had already left were met by a Russian airplane which was to carry them to Moscow. Instead, they were landed in Siberia and transferred to a train to continue their journey. As a result, they arrived in Moscow ten days after the sobor had adjourned.

They found that one Alexy had been named Patriarch of the Russian Orthodox Church, and they presented to him a report of the church in North America and a request for the lifting of the spiritual separation on terms of autonomy. In return, they were handed a prepared document, the so-called ukase of February, 1945, for delivery to Metropolitan Theophilus. The terms of this ukase were not acceptable to the North American church. Instead of the necessary autonomy, the ukase provided for the calling of a sobor in America to be presided over by an archbishop sent from Russia. The sobor was to be required to declare in the same of the church "its abstention from political activities against the U. S. S. R. and give corresponding orders to all parishes". There was no comment or provision concerning the status of Metropolitan Theophilus, the elected head of the North American church. Instead, the sobor was to be required to elect

[15] As stated in an official report of the metropolitan district, "It seemed, in form at least, that the mother church was being restored to a position of dignity and usefulness. * * * The time appeared to be ripe for a discussion of the terms on which the two churches might be reunited."

a new person to be head of a new metropolitan district. Two representatives of the then Moscow Patriarchate were recommended as candidates for the position, and the right was reserved to refuse confirmation of the person chosen "if he be considered unsuitable by the Patriarchy, for any motivated reason whatsoever". There was an intimation that "some extended powers" might be given to the person so chosen and confirmed, "but the right to confirm candidates for bishop, the right to reward the clergy with higher titles, and the right of appeal as regards bishops, clergy and others, remain with the Moscow Patriarchy."

A council of the bishops of the North American metropolitan district met in May, 1945, and decided that the terms proposed in the ukase of February, 1945, were not acceptable.[16]

The attempts at reconciliation having met with failure, the metropolitan district decided to commence this action to recover possession of St. Nicholas Cathedral, which by

[16] In an official report to the clergy and laymen, published in July, there was a full discussion of the background and necessity of the 1924 declaration at Detroit of temporary autonomy for the North American metropolitan district. Reference was made to the recent efforts at unity, the chicanery by which the American delegates were prevented from attending the Moscow sobor, and the substance of the ukase then issued. The report emphasized that the metropolitan district considered itself as part of the Russian church and desired that the suspension be lifted. It was pointed out, however, that the text of the ukase disclosed that the Moscow patriarchate had "little conception of the conditions of church life in this country, and of the atmosphere of religious and political freedom in which the American Church has developed." Then followed a point-by-point analysis of the ukase. One of the major obstacles was the insistence of the patriarchy upon renunciation of political activities against the U. S. S. R. The report said: "It would be inconsistent with the duties and obligations of loyal American and Canadian citizens, and contrary to the traditional atmosphere of freedom of speech and political action in these countries, for the Russian Church in America to give the pledge of loyalty to a foreign power which is implicit in the demand of the Patriarchal Ukase." Another stumbling block was the vagueness of the ukase as to the powers of the North American church. It was felt that "the precise nature of the relationship between the two churches should be defined in advance. This is particularly necessary in view of the precarious situation of the mother church, existing as it does by sufferance of a totalitarian regime."

custom and rule had always been the See of the Russian Orthodox Church in North America and the residence and place of worship of the ruling bishop of the church in North America. Technically, the plaintiff in this action is the corporation, "Saint Nicholas Cathedral of the Russian Orthodox Church of North America". When the land for the proposed cathedral was acquired in 1899, title was taken in the name of a religious corporation organized pursuant to the Religious Corporations Law of 1895 (L. 1895, ch. 723, §50) which provided that the incorporators of such Orthodox churches should be, by virtue of office, the Russian Ambassador and the Consul-General. This corporation, so formed, retained title until 1925, with the exception of one year (1916-17) when title was temporarily placed in the name of the then ruling Archbishop Evdokim to whom John S. Kedrovsky, when he brought his 1918 action, was subject as a priest and whom, he in his complaint, recognized as the true head of the North American Diocese.

In 1925, a special act of the New York State Legislature (L. 1925, ch. 463) created the plaintiff corporation, composed of Metropolitan Platon and others of the metropolitan district, to which the old or 1899 corporation transferred the cathedral property. The deed was signed by the Russian Consul General, but not by the other statutory incorporator, the Russian Ambassador, as we did not then recognize the Russian Government in that country. That necessary defect was cured, and all such deeds validated by a subsequent act of our Legislature. (L. 1942, ch. 206.) Moreover, the corporate existence of the plaintiff corporation was specifically confirmed by still another act of our Legislature (L. 1945, ch. 817), "notwithstanding any non-user by said corporation of its corporate rights, privileges and franchises or the lapse of any period of time during which said corporation was inactive." The plaintiff corporation, accordingly, is the present owner of the record title to St. Nicholas Cathedral. This is not, however, the ordinary ejectment action, in which proof of such title and of an ouster would constitute ground for relief. Since 1875 (L. 1875, ch. 79) our Legislature has provided for the denominational control and administration of church prop-

erties and temporalities. (See Religious Corporations Law, §5.) The corporate owner of the title thus holds the property *in trust* for the religious body for whose use it was dedicated. Plaintiff does not dispute this trust theory, but on the contrary relies upon it. Plaintiff has endeavored to prove that the beneficial use of the property today rightfully belongs to the Russian church in America (Religious Corporations Law, §105) which was forced to declare its administrative autonomy at the Detroit sobor of 1924 in order to preserve and adhere to those principles and practices fundamental to the Russian Orthodox faith, free from the influence of an atheistic and antireligious foreign civil government.

The action, as stated, was commenced against John Kedroff, the second son of John S. Kedrovsky, in April, 1945. Apparently fearful of his anomalous status, as a cleric of a concededly extinct church, (the "Renovated Church"), Kedroff made overtures to Benjamin, the representative of the Moscow Patriarchate, and in October, 1945, was *reordained* by Benjamin and thereupon surrendered the cathedral premises to Benjamin, as head of a new diocese of a different church.

We must remember that Benjamin never possessed or occupied the cathedral until after the commencement of this action on April 9, 1945, against the defendant Kedroff. Benjamin was not originally a party herein because he was not an occupant of the cathedral but was later permitted to intervene. Kedroff, the second son of Kedrovsky, was but a priest of the schismatic "Renovated Church" and thus could not have defended this action as an occupant of the cathedral. He therefore went to Benjamin, recognized him as the "Chief Church Authority", and said "Ordain me all over again" and had himself reordained as a priest by Benjamin in what must have been the latter's new diocese. When Benjamin did so reordain Kedroff as a priest, the latter "gave" the cathedral to Bejamin according to Benjamin's counsel here. Thereafter, in order to obtain an adjournment in this action, Benjamin stipulated to and did give up possession of the cathedral on June 6, 1947. At the time of the trial, when he was called

by the plaintiff *only*, Benjamin was living at 38 Halsey Street in Brooklyn. Benjamin was therefore an occupant of the cathedral only from October, 1945, a time subsequent to the commencement of this action, until June 6, 1947.

Kedroff had interposed a general denial to plaintiff's complaint. After Benjamin, following such surrender by John Kedroff, took over the cathedral, he was permitted to intervene and interposed the present amended answer setting up four affirmative defenses. Only the first need concern us here. The second, third and fourth defenses, i.e., nonuser and lack of authority in plaintiff, the Statute of Limitations and laches, respectively, were either ignored, abandoned or found in plaintiff's favor below. There was little or no discussion concerning them and they have been effectively eliminated from the case. The first affirmative defense sets up Benjamin's appointment and his asserted right to occupy the cathedral by virtue of such appointment to that office.

Before this action was commenced a new article of the Religious Corporations Law, 5-C, was passed by both houses of the New York Legislature. It was subsequently signed by the Governor. This legislation had a conclusive effect upon the issues presented in the case at bar and will be discussed at length below. Quite apart from this legislative action with respect to the specific dispute here involved, we think that, as a matter of common law as intimated by our 1928 decision in *Kedrovsky* v. *Russian Catholic Church* (249 N. Y. 75, *supra*), there was ample basis and room for an exercise of the discretionary power of the Supreme Court over the conduct of trustees, in favor of the North American metropolitan district. We think that in the light of historical facts and the evidence in the records before us, the conclusion would have been fully warranted that the leaders of the North American metropolitan district are the trustees "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust" (pp. 77-78), i.e., who may administer the temporalities of St. Nicholas Cathedral for the benefit of the faithful for whose use it was originally dedicated.

The courts below, in granting judgment herein to de-

fendants, did not determine, in the exercise of their discretion, whether defendants could be relied upon to carry out faithfully and effectively the purposes of the religious trust. The *Westminster* and *Watson* cases (*supra*), were cited and the conclusion drawn that St. Nicholas Cathedral must be occupied by an archbishop appointed by the central authorities in Moscow and that Benjamin, who was so appointed, was therefore, entitled to the possession of the cathedral. This, we think, was error. The determinative issue in the case, apart from the action of the Legislature with respect to the problem, was whether there exists in Moscow at the present time a true central organization of the Russian Orthodox Church capable of functioning as the head of a free international religious body. If the Moscow patriarchal throne has been resurrected by the Soviet Government solely as a means of influencing opinion at home and abroad, and if it may now operate on an international scale, not as a true religious body, but only as an extension or implementation of Russian foreign policy, then it is clear that the North American metropolitan district and not the appointee or ambassador of the central authorities in Moscow, is the proper trustee to manage for the benefit of the faithful in this hemisphere those religious temporalities dedicated to the use of the Russian Orthodox mission and diocese prior to 1924 when it became an administratively autonomous metropolitan district. (Religious Corporations Law, §105.)

We know that a nominal church organization exists in Russia, but that is not enough. We are told—by the *only* witness called by the defendants and one who supplied the *only* testimony to this effect—that "from 1925 to date, the church has received greater liberty and is functioning freely as an orthodox church, without interference by the civil authorities, and the political views held by the authorities, *and any atheistic sentiment that they may have in no way interferes* with the unhampered activities of the Russian Orthodox Church." On the other hand, plaintiff urges that, willingly or not, the Moscow patriarchy is unable to conduct "church-administrative activity" except as an arm of the Russian Government to further its domestic and foreign

policy; that that is a fact publicly recognized by our President and our State Department; and that it is attested to and demonstrated in the records submitted to us by (1) the imprisonment of Patriarch Tikhon, (2) the suppression of the patriarchal church during the days of the State-supported schism of the "Renovated Church" and (3) by the later re-establishment of an enfeebled patriarchate, when the "Renovated Church" had served its purpose, willing to pledge its loyalty to the Russian State and to attempt to exact a similar pledge from clergy abroad. Having in mind the warning of Lord COLERIDGE, in *Lumley* v. *Gye* (2 El. & Bl. 216, 267), "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of court, are familiar with", we feel we must accept the historical statements contained in the dissenting opinion of Mr. Justice VAN VOORHIS, below: "* * * In recent public pronouncements the State Department, and our representatives in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistice Day Address, November 11, 1949)." (276 App. Div. 309, 330.)

Everyone agrees that the Russian Orthodox Church has continuously existed down through the centuries, for no communicant would concede that the suppression of the church by the Soviet Government had ever destroyed the patriarchy as a *spiritual symbol* of the spiritual unity of the Church as distinguished from its temporalities. Moreover, members of the North American metropolitan district admittedly revere and respect the *office* of the patriarchy, whatever may be their feelings as to the merits of the current incumbent of the office. This devotion is traditional and serves as a common bond for the members of the *Russian* Orthodox Church, as distinguished from the members of other Orthodox churches in various countries which have recognized as their spiritual heads at various times the Patriarchates of Constantinople, of Alexandria, of Antioch,

of Serbia and of Jerusalem. Recognition of the Moscow patriarchy by the North American metropolitan district in that sense is by no means a disavowal of the position steadfastly maintained by it down to the present day, viz., that the beloved patriarchy has been absorbed by the Russian Government and its action deprived, during the period of such domination, of any religious significance.

In short, we think that further inquiry might well have been made into the present status of the patriarchate in Russia and we think the Supreme Court should have determined, in the exercise of its discretion, whether Benjamin, the appointee of the central church authorities in Moscow, or Metropolitan Theophilus, the archbishop of the North American metropolitan district, was the proper person to administer the temporalities of St. Nicholas Cathedral and whether he was the proper trustee "who may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)." (*Kedrovsky* v. *Russian Catholic Church*, 249 N. Y. 75, 77-78, *supra*.) That was not done because it was thought that the cases of *Watson* v. *Jones* (13 Wall. [U. S.] 679, *supra*), and *Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church* (222 N. Y. 305, *supra*), required a decision in favor of defendants and that the earlier case of *Kedrovsky* v. *Rojdesvensky* (242 N. Y. 547, *supra*), was determinative of some phases of the problem. Our views on this aspect of the controversy would require reversal and the ordering of a new trial so that the Supreme Court might exercise its discretion along the lines herein indicated. It is unnecessary, however, to discuss that further, for there is another ground requiring reversal here and judgment in favor of the plaintiff and the North American metropolitan district which it represents.

We refer, of course, to the authoritative and unambiguous action finally taken by the New York State Legislature in 1945 and 1948 with respect to the controversy which has now occupied the attention of our courts for a quarter of a century.

If there were any doubt as to the proper determination of the case along common-law lines, it has been completely

eliminated by the Legislature. In April of 1945 (L. 1945, ch. 693), the Governor signed a bill adding a new article 5-C to the Religious Corporations Law consisting of four sections, two of which, sections 105 and 107, are presently material. In 1948 (L. 1948, ch. 711) important amendments were made to these sections which will be noted later. In the first section (§ 105), the Legislature defined the "Russian Church in America" (i. e., the North American church as we have referred to it above) and carefully traced its origin. The first paragraph of the section 105, as it reads today, is as follows: "The '*Russian Church in America*', as that term is used anywhere in this article, *refers to that group of churches, cathedrals,* chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) *which were known as* (a) Russian American Mission of the Russian Orthodox Church from in or about 1793 to in or about 1870; (b) Diocese of Alaska and the Aleutian Islands of the Russian Orthodox Church from in or about 1870 to in or about 1904; (c) Diocese of North America and the Aleutian Islands (or Alaska) of the Russian Orthodox Church from in or about 1904 to in or about 1924; and (d) Russian Orthodox Greek Catholic Church of North America since in or about 1924; *and were subject* to the administrative jurisdiction of the Most Sacred Governing Synod *in Moscow* until in or about 1917, later the Patriarchate of Moscow, *but now constitute an administratively autonomous metropolitan district* created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April 2nd to 4th, 1924". (Emphasis supplied.)

The second paragraph of section 105, defines what is meant in the statute by the phrase "Russian Orthodox church." This is used as a word of art and is used generally to denote the particular local buildings or organizations of the Russian Orthodox faith as distinguished from the spiritual church. The statutory definition reads as follows: "A 'Russian Orthodox church', as that term is used anywhere in this article, is a church, cathedral, chapel,

congregation, society, parish, committee or other religious organization founded and established for the purpose and with the intent of adhering to, and being subject to the administrative jurisdiction of said mission [a above], diocese [b and c above], or autonomous metropolitan district [d above] hereinabove defined as the Russian Church in America." It is to be noted that the words "Russian Orthodox church" refer not only to those church buildings and religious organizations founded and established for the purpose and with the intent of adhering to, and being subject to the autonomous North American metropolitan district *since 1924*, but also to those properties and organizations adhering and subject in the past to the Russian Mission from 1793 to 1870, and the North American Dioceses from 1870 to 1904 and from 1904 to 1924.

These definitions, in turn, make the meaning and intent of section 107 clear. With them in mind, the following command of the Legislature in section 107 is abundantly plain:

"1. *Every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district*, and whether incorporated or reincorporated pursuant to this article *or any other article of the religious corporations law*, or any general or private law, *shall recognize and be and remain subject to the jurisdiction and authority* of the general convention (sobor), metropolitan archbishop or other primate or hierarch, the council of bishops, the metropolitan council and other governing bodies and authorities *of the Russian Church in America*, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October 5th and 8th, 1937, and any amendments thereto and any other statutes or rules, heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America *and shall in all other respects conform to, maintain and follow the faith*, doctrine, ritual, communion, discipline, canon law, traditions and *usages of the Eastern Confession* (Eastern Orthodox ~~or~~ Greek Catholic Church).

"2. * * * *

"3. *The trustees of every Russian Orthodox church shall have the custody and control of all temporalities and property,* real and personal, belonging to such church and of the revenues therefrom *and shall administer the same in accordance with the by-laws* of such church, the normal statutes for parishes of the *Russian Church in America* approved at a general convention (sobor) thereof held at Cleveland, Ohio, on or about or between November 20th, to 23d, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America." (Emphasis supplied.) Little, if anything, is left for the courts to construe in the face of such a clear manifestation of intent. St. Nicholas Cathedral, the subject property herein, is indisputably a "Russian Orthodox church", as defined in the statute. It was built in 1903 and dedicated as a cathedral in 1905, in connection with the establishment of the Diocese of North America and the Aleutian Islands, which as we have seen, is listed in the first paragraph of section 105. It is a "cathedral * * * founded and established for the purpose and with the intent of adhering to and being subject to the administrative jurisdiction of said mission, *diocese,* or autonomous metropolitan district hereinabove defined as the Russian Church in America". (Emphasis supplied.) As such, it is within the purview of subdivision 1 of section 107 and must be subject to the jurisdiction and authority of the governing bodies of the North American church. Likewise, pursuant to subdivision 3 of section 107, the trustees of the St. Nicholas Cathedral corporation must administer the cathedral in accordance with the by-laws, the normal statutes for parishes of the Russian Church in America as therein defined.

Special Term attempted to construe the statute, as it stood in 1945, in such a manner as to make it applicable *only* to those *new* parishes, founded and established *after 1924* for the express purpose of adhering to the Russian Church in America. Whether the court's construction was justified under the then wording of the statute is not before us, for after the decision at Special Term, and obviously

as a result of it, the Legislature amended the statute to read in its present form, above quoted. In order that there might not be any doubt that the 1945 legislation was intended to apply to a property, such as St. Nicholas Cathedral, the second paragraph of section 105, defining "Russian Orthodox Church", was amended so that there was included within its compass any cathedral "founded and established for the purpose and with the intent of adhering to, and being subject to the *administrative* jurisdiction of said *mission, diocese or autonomous metropolitan district hereinabove defined* as the Russian Church in America." (New matter italics.) Likewise, subdivision 1 of section 107, which provides that every such Russian Orthodox church in this State shall "recognize and be and remain subject to the jurisdiction and authority" of the Russian Church in America, was amended to provide that such Russian Orthodox churches were within its coverage "whether incorporated *before or after the creation* [1924] *of said autonomous metropolitan district.*" (New matter italics.) These significant amendments, enacted within a month after Special Term's decision, illustrate beyond cavil that the decision of that court did not correspond with the intent of the Legislature, which immediately interpreted and explained its prior enactment.

Nevertheless, the majority in the Appellate Division, while conceding that plaintiff was entitled to the benefit of the statute in its amended form, failed to properly appreciate and give meaning to what we consider to be the plain legislative intent. It said in part (p. 317): "In other words, it appears to us that it [§ 107] was intended to mean that any church *heretofore or hereafter* incorporated for the purpose of adhering to the American Church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church [the American church, the autonomous metropolitan district, created in 1924]." Such a view gives no meaning to the change made by subdivision 1 of section 107, by the 1948 amendment. That amendment excised the three words ("heretofore or hereafter") which we have italicized in the above quotation, and substituted the words: "before or after the creation of

said autonomous metropolitan district, [in 1924] * * *." The following quotation from subdivision 1 of section 107 shows in brackets the words eliminated by the 1948 amendment and indicates by italicizing the words substituted by that amendment: "Every Russian Orthodox Church in this State, whether [heretofore or hereafter] incorporated *before or after the creation of said autonomous metropolitan district,* * * * shall recognize and be and remain subject to the jurisdiction and authority of * * * the Russian Church in America, * * *." The Legislature quite clearly made the amendment after the decision at Special Term herein so as to remove the possibility of a construction such as that adopted by the Special Term and later the Appellate Division, that the statute was limited in its operation to churches incorporated after 1924. If, as the Appellate Division construed it, the statute were limited to churches "incorporated for the purpose of adhering to the American Church", that would mean that it could only apply to churches founded and established after 1924, since that was the year in which the autonomous metropolitan district, denominated by the Appellate Division, the American church, was created. Yet subdivision 1 of section 107 clearly states that it is to apply to Russian Orthodox churches "whether incorporated *before or after* the creation of said autonomous metropolitan district," i. e., before or after 1924. The only construction which gives meaning to all the language in sections 105 and 107 is that the statute was intended to apply to those Russian Orthodox churches founded and established before 1924 for the purpose of adhering and being subject to the North American Mission or North American Diocese, and to those Russian Orthodox churches founded and established after 1924 for the purpose of adhering and being subject to the autonomous metropolitan district. The majority in the Appellate Division further intimated that to read the statute literally would result in an interference in ecclesiastical concerns not within the competency of the Legislature. The latter suggestion is the only one which requires discussion, for, as already indicated, the intent of the Legislature (as distinguished from its competency) is unmistakable.

The primary purpose of the Religious Corporations Law is to provide for an orderly method for the administration of the property and temporalities dedicated to the use of religious groups and to preserve them from exploitation by those who might divert them from the true beneficiaries of the trust. Prior to 1875, when the Legislature provided for denominational control of the temporalities of religious corporations, the majority of the members of a religious corporation could change its denominational character and devote the church property to an entirely different religious faith than that for which it was originally dedicated. (*Robertson* v. *Bullions*, 11 N. Y. 243, 263-264; *Petty* v. *Tooker*, 21 N. Y. 267; *Gram* v. *Evangelical Lutheran Soc.*, 36 N. Y. 160). For the public good, the Legislature decreed that the trustees of religious corporations, irrespective of the wishes of the majority of the local congregation, must administer the temporalities in accordance with the discipline, rules and usages of the ecclesiastical body, if any, to which the corporation was subject. (Religious Corporations Law, §5.) As a broad guide this rule undoubtedly has worked well, but it is by no means a constitutional doctrine not subject to change or modification by the same Legislature which announced it, in cases where literal enforcement would be unreasonable and opposed to the public interest. The Legislature, in the exercise of its extensive and acknowledged power to act for the common welfare, may find as a fact that a situation has arisen of such novelty and uniqueness that existing law is incapable of performing its avowed function—the preservation of religious temporalities for the use of their original and accustomed beneficiaries. If the Legislature find as a fact that, because of drastically changed circumstances, the accustomed beneficiaries of religious properties are thus threatened with their loss, and if there be a basis for such finding, we perceive no constitutional objection to a legislative attempt to trace and identify, as of today, the authentic group entitled to the administration of such properties.

That, as we see it, is all that the Legislature has done in the above-quoted provisions of article 5-C. The Legisla-

ture has made a determination that the "Russian Church in America" was the one which, to use our words in 249 New York at pages 77, 78, was the trustee which "may be relied upon to carry out more effectively and faithfully the purposes of this religious trust (*Carrier* v. *Carrier*, 226 N. Y. 114)" by reason of the changed situation of the patriarchate in Russia. No purpose would be served by repeating all the circumstances which forced the North American church to declare its temporary autonomy, and the process by which the Moscow Patriarchy has been subjugated by the Russian Government and used as its tool. All that has been detailed fully above. These facts must be deemed to have been found by and to have been within the actual knowledge of the Legislature when it decided to act in 1945 and 1948. Even assuming that we, as judges, are prevented from recognizing these facts, it cannot be successfully contended that the Legislature is required to labor under such unrealistic handicap.

The Legislature of the State of New York, like the Congress of the United States, in addition to the general knowledge of its members, has access to vast sources of information to assist in determining the need and scope of new statutory law. Every new piece of legislation is the result of certain factual premises, whether they be expressed or tacit. In gathering the material for these premises, and in evaluating conflicting data, the Legislature is not bound by any formal rules. It has the widest latitude of inquiry. It cannot, and does not, close its eyes to any legitimate avenue of knowledge.

The courts have always recognized that it is the province of the Legislature to make the underlying findings of fact which give meaning and substance to its ultimate directives. The courts have traditionally refused to consider the wisdom of technical validity of such findings of fact, if there be some reasonable basis upon which they may rest.

Thus, in passing upon matters of legislative intent and competence, the courts do not merely read the bare end product of the legislative labors. They read the statute in the light of the state of facts which were found by the Legislature, and which prompted the enactment. Then, and

only then, can the courts intelligently approach their assigned tasks.

A recent pertinent example of such judicial recognition of the extent of the power of the legislative body to find the facts in a situation involving communist activity is found in *American Communications Assn.* v. *Douds* (339 U. S. 382). There, the noncommunist oath provision in the National Labor Relations Act was upheld, not because any such oath requirement was generally within the power of Congress, but because the specific evil, *the existence of which Congress was assumed to have reasonably found as a fact,* was such that some infringement upon traditional liberties was justifiable. The case illustrates well that enactments which might seem unconstitutional on their face may yet be sustained if the factual background found by the legislative body warranted an extended exercise of its powers. The case is noteworthy, too, in that it rejects the fallacious contention that the legislative body cannot go behind a carefully constructed facade to ascertain the real motives, ends and techniques of communist activity. It recognizes, as we must recognize in the instant case, that problems created by the extension of Soviet communist activity in this country are *suigeneris,* and can only be dealt with intelligently on that basis.

As Justice JACKSON said in his opinion (p. 423, fn. 1): "Of course, it is not for any member of this Court to express or to act upon any opinion he may have as to the wisdom, effectiveness or need for this legislation. 'Our inquiries, where the legislative judgment is drawn in question, must be restricted to the issue *whether any state of facts either known or which could reasonably be assumed affords support for it.' United States* v. *Carolene Products Co.* 304 U. S. 144, 154." (Emphasis supplied.) (See, also, *Powell* v. *Pennsylvania,* 127 U. S. 678, 685; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257-258; *Szold* v. *Outlet Embroidery Supply Co.,* 274 N. Y. 271, 278.)

The judicial technique of ascertaining the legislative finding of fact supporting a particular enactment is shown in Justice JACKSON's opinion in the *Douds* case (*supra,* pp. 424-433). He wrote (p. 424):

"From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics." (Then follows a footnote containing a long list of books and articles.) * * *

"It rejects the entire religious and cultural heritage of Western civilization, as well as the American economic and political systems. This Communist movement is a belated counter-revolution to the American Revolution, designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights * * *" (p. 425).

The Legislature of the State of New York, like the Congress, must be deemed to have investigated the whole problem carefully before it acted. The Legislature knew that the central authorities of the Russian Orthodox Church in Russia had been suppressed after the 1917 revolution, and that the patriarchate was later resurrected by the Russian Government. The Legislature, like Congress, knew the character and method of operation of international communism and the Soviet attitude toward things religious. The Legislature was aware of the contemporary views of qualified observers who have visited Russia and who have had an opportunity to observe the present status of the patriarchate in the Soviet system.[17] The Legislature realized that the North American church, in order to be free of Soviet interference in its affairs, had declared its tem-

[17] Our former Ambassador to Russia wrote: "The new tolerance for the Orthodox Church can be seen, therefore, as severely limited and primarily designed to serve as an instrumentality of an expansive foreign policy." (Walter Bedell Smith, My Three Years in Moscow, p. 268.) See, also, Anne O'Hare McCormick in the *New York Times*, April 8, 1950: "The church has again an official place in the Soviet Union, but as an agency of the state; on the same terms the religious leaders being imprisoned and executed as 'traitors' in the countries under Soviet control would be tolerated. When Caesar is also God there can be no divided tribute."

porary administrative autonomy in 1924, pursuant to the ukase of 1920, while retaining full *spiritual* communion with the patriarchate, and that there was a real danger that those properties and temporalities long enjoyed and used by the Russian Orthodox Church worshippers in this State would be taken from them by the representatives of the patriarchate. On the basis of these facts, and the facts stated (*supra*) and no doubt other facts we know not of, our Legislature concluded that the Moscow Patriarchate was no longer capable of functioning as a true religious body, but had become a tool of the Soviet Government primarily designed to implement its foreign policy. Whether we, as judges, would have reached the same conclusion is immaterial. It is sufficient that the Legislature reached it, after full consideration of all the facts.

It is clear, therefore, that the plaintiff corporation and the autonomous metropolitan district which it represents, must prevail in this action in accordance with the legislative finding and mandate and be reinvested with the possession and administration of the temporalities of St. Nicholas Cathedral.

The judgments below should be reversed, with costs in all courts, and judgment directed for the plaintiff.

Froessel, J. (concurring). As I view this controversy, we have the rather unusual situation of a foreign government, which all of us agree is grossly antireligious, assuming domination and control over the Russian Orthodox Church, leaving that church fettered, helpless and restrained of its freedom. Any other view, it seems to me, is to ignore stark reality. Under that domination, which is nothing less than plain duress, it seeks to reach out to the United States to assume control of church property within this State, title to which is held by plaintiff, a New York State corporation, and which property has been dedicated to the use of members of a parish and of a diocese.

The evidence in the records before us, and as outlined in the prevailing opinion, buttressed by facts of historical knowledge of which we may take judicial notice (*Nankivel v. Omsk All Russian Government*, 237 N. Y. 150, 156), and

as found by the Legislature of this State (*East New York Sav. Bank* v. *Hahn*, 293 N. Y. 622), leads inescapably to the conclusion that plaintiff is entitled to judgment.

Judge CONWAY has sufficiently outlined in detail the history of the Russian Orthodox Church, so far as pertinent here. We are all in accord that the election of Patriarch Tikhon at the sobor of 1917-18, following the Kerensky revolution, had indisputable validity, and that Archbishop Evdokim was the duly appointed diocesan archbishop for North America in 1917, before he returned to Russia. It was he who held title to the property in suit for a short time (1916-17), and then voluntarily reconveyed it to plaintiff's corporate predecessor. After Kerensky was overthrown and the Bolsheviks came into power, the patriarchal chain of succession was broken. The prevailing opinion outlines briefly what happened to the Russian Orthodox Church in Russia. When Patriarch Tikhon, the last duly elected patriarch, was imprisoned, he issued his famous ukase to the Russian Orthodox Church abroad. In 1923, with the concurrence of the Sacred Synod, he designated Platon as ruling bishop of the North American church, who continued until his death in 1934, following his active participation in and approval of the American sobors, commencing in 1922, which invoked the ukase of 1920.

The first sobor of the Russian Orthodox Church held since Tikhon was elected Patriarch was the psuedo-sobor of 1923, at which no Patriarch was elected, and which is now conceded to have been uncanonical. The only other sobor held since was the one at Moscow in 1945, when the American delegates, two clergymen, were met by a Russian airplane, but deposited in Siberia instead of Moscow in the month of January, rendering it impossible for them to complete their journey by train until ten days after the sobor had adjourned, thus denying them representation though duly invited.

We do not have here any such situation as was presented in *Watson* v. *Jones* (13 Wall. [U. S.] 679) where the highest church body was concededly free. Here, the Russian Orthodox Church, as presently constituted and dominated, is

not free, its administrative agency is not the true body of the church, and is compelled to demand loyalty to the Soviet Government from all the priests of the Russian Church abroad.

By our decision, we are not intruding unlawfully into the internal affairs of a religious body, but rather refusing to sanction such intrusion by an atheistic foreign government, so far as it affects property within our jurisdiction. Plaintiff-appellant holds title to the property in suit, in trust, not for the Russian Orthodox Church, but rather for the use of the membership for whom it was dedicated, and, so long as it administers the property for the faithful of the church within the diocese, it is entitled to possession and control. (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 213.) As we there said (pp. 225, 226), where the ecclesiastical governing body's freedom of action was unquestioned, "* * * The error which, as it seems to me, pervades the disposition made of this case in the courts below, is the idea that the Presbytery could take away from the Westminster Presbyterian Church of West Twenty-third Street all authority and control of its trustees over its real property, and by hostile action appropriate that property to such uses as it saw fit without any legal proceeding to that end, and wholly by the exercise of the ecclesiastical jurisdiction of the Presbytery." How much more so does this reasoning apply to the instant situation.

I concur in Judge CONWAY'S opinion.

DESMOND, J. (dissenting). None of us, of course, deny that the present Russian Government is frankly and grossly antireligious and irreligious. But judicial recognition of that well-known fact is of no help in deciding this lawsuit. We are dissenting here because we strongly feel that this decision is an unlawful intrusion into the internal affairs of a religious body, contrary to first principles of American Government, violative of the First Amendment's guaranty of freedom of religions from such governmental interference, and in conflict with the controlling decisional law as set forth in *Watson* v. *Jones* (13 Wall. [U. S.] 679) and *Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.* (211 N. Y. 214). For the decision about to be made is

just this: that the judicial and legislative branches of the Government of this State have the power (and that the New York State Legislature has exercised the power) to oust from the archdiocesan cathedral of the Russian Orthodox Church in New York City, a prelate (defendant Benjamin) who has been appointed archbishop of that archdiocese by the Patriarch of Moscow, supreme head of that church. No other decision reaching such a result can be found in the books.

In aid of clarity we set down these indisputable and uncontested propositions:

1. The Russian Orthodox Church is a "general" or centrally-organized church (see *Watson v. Jones, supra*, p. 722), under whose law and discipline the Patriarch of Moscow, as its supreme head, has the power of appointing archbishops.

2. Defendant Benjamin was appointed by the Patriarch as archbishop of the diocese of North America and the Aleutian Islands, and that appointment is now in effect.

3. The Russian Orthodox Cathedral in New York City, is the See church of the archdiocese, and, accordingly, defendant Benjamin, as the duly appointed archbishop is entitled to possess and occupy that cathedral as his See church.

4. Plaintiff-appellant, a New York corporation, holds title to the cathedral property but, under New York law, that title is in trust for the religious purposes of the Russian Orthodox Church, and for no other purpose (*Westminster Presbyt. Church* v. *Trustees of Presbytery of N. Y.*, 211 N. Y. 214, 223, *supra*).

5. Plaintiff, in seeking to exclude defendant Archbishop Benjamin from possession of the cathedral, is acting under the control of, and in the interest of, a dissident or schismatic group of Russian Orthodox Catholic individuals and parishes, which group, formed at Detroit in 1924, refuses to recognize the authority and primacy of the Patriarch of Moscow.

6. Under the law of New York (see Religious Corporations Law, § 5), religious denominations, such as the world-

wide Russian Orthodox Church, have denominational control over their constituent churches, parishes or branches, and the constituents cannot escape such control by secession (*Trustees of Presbytery of N. Y.* v. *Westminster Presbyt. Church*, 222 N. Y. 305, 313).

7. The appointment of Archbishop Benjamin, as an official act of the highest Russian Orthodox Church authority, was a decision on a denominational matter of internal church government, and as such is final and absolutely binding on the civil courts of this State (*Watson* v. *Jones*, 13 Wall. [U. S.] 679, 727, 729, *supra*).

The sum of those plain propositions is this: that Archbishop Benjamin's possession of the cathedral is not subject to control by any civil authority or by any judgment of a civil court, and that no civil court may decree to the independent or nonconformist group (which controls plaintiff corporation), possession of that cathedral, hostile to the authority and action of the mother church (*Watson* v. *Jones*, *supra*, at p. 734).

What bases, then, are announced for the direction by this court that a judgment issue which will remove defendant Benjamin from his cathedral? As we understand it, those asserted grounds are two: first, that the Moscow Patriarchate is not in fact functioning as the true central organization of the Russian church but is a mere agency or instrumentality of the Soviet regime; and, second, that article 5-C of the New York Religious Corporations Law has, by legislative fiat, ousted the patriarchal appointee, and turned the cathedral over to the schismatics. The first of those bases amounts to a new finding by this court, without evidentiary support in this record, and in the face of contrary testimony, and express contrary findings by both courts below. The second basis gives to article 5-C a construction not reasonably supported by its language, or by its history, or by any reasonable or discoverable legislative intent—a construction which, furthermore, makes the statute unconstitutional. We now take up these matters in turn.

The finding, or determination, now being made by the majority of this court as a basis for reversal, is that the presently ruling Patriarch of Moscow is not, and should

not, be treated as, the true central head of the church, but that he is a mere fellow traveler on the communist road, serving not God but the Soviet Caesar. Interestingly enough, plaintiff itself seems not to cast so cold an eye on the Patriarch, since the record abounds with protestations by the "American", or schismatic Orthodox Russians, of their filial loyalty and devotion to the Patriarch, whom they regard as a virtuous and venerable spiritual leader. Aside from that, and confining ourselves within the strict bounds of our own jurisdiction we, the Court of Appeals, have, of course, no power or right to adjudicate that the incumbent is no true Patriarch but a mere usurper or pretender. We dissenters refuse so to do, not from any mere naiveté as to Russia and communism, but as a necessary conclusion from the record in this lawsuit. At the very most, we have here the attempted determination of a fact, vigorously denied by witnesses, and found to the contrary by the courts which have jurisdiction to pass on facts.

It is suggested that common sense, or general knowledge, makes it appropriate for us to take judicial notice that Patriarch Alexy is not acting independently but is obeying commands of his communist masters. Perhaps he is, for all we know, but his motivation is no proper subject of judicial notice. Many years ago our predecessors warned us against taking judicial notice in such uncertain fields (see *Baxter* v. *McDonnell*, 155 N. Y. 83, 93). And, even if we could, somehow or other, get sure knowledge that the Patriarch's appointment of this archbishop was made for the most unholy reasons, or because of the meanest accommodation to brute power, we still could not, as a court, strike down the appointment or refuse to give it credit. The Patriarch, like all men, must account for his stewardship, but not to the New York courts.

The long and the short of it is that this is an ecclesiastical matter, to which, be their answer right or wrong, the ecclesiastic superiors have the final answer. "* * * and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt, which would do anything but improve either religion or good morals" (*Connitt* v. *Reformed Prot-*

estant Dutch Church of New Prospect, 54 N. Y. 531, 562). We are not talking about the powers of courts or of government to keep from our shores persons dangerous to our institutions, be they churchmen or laymen, or to deal with such persons when and if they violate our laws. No one has testified that Archbishop Benjamin is such a subversive, and, if he were, the New York courts would hardly be the place, or an action of ejectment the method, to arrange for his deportation from our shores. The United States Government has never withdrawn recognition of the Russian Orthodox Church and its Patriarch (see *Ponce* v. *Roman Catholic Church*, 210 U. S. 296, 318).

We turn now to the statute which seems to be appellant's chief reliance. Article 5-C of the Religious Corporations Law, consisting of four sections (§§ 105-108), was enacted in 1945 (L. 1945, ch. 693) and amended in 1948 (L. 1948, ch. 711). Its language follows the general pattern of several other articles in the same law. On its face there is no indication that it had any purpose other than that of any other special or general law incorporating a religious society or sect or church, that is, "to give an organization for public worship legal rights, and to impose on its legal obligations as a corporate body * * *" (*Van Buren* v. *Reformed Church of Gansevoort*, 62 Barb. 495, 497; *Petty* v. *Tooker*, 21 N. Y. 267, 271). Incorporation of a church is the method by which the municipal law recognizes a church's present existence. Obviously, such a statute cannot be a device for transferring property from one faction to another, or for subjecting centrally organized churches to the control of seceding groups. Neither of those two general statements will be contradicted, and yet we are told that the passage by the New York Legislature, in 1945, of article 5-C and its amendment in 1948, had the precise and intended effect of freeing the whole Russian Orthodox religious community in America from its traditional submission to its supreme hierarchial head, of outlawing in New York so much of that community as remained submissive to the Patriarch, of putting the whose group and all its properties under the control of the new schismatic "Russian Church of America", and, specifically, of mandating the ouster of the patriarchically ap-

pointed archbishop and the substitution of a rival claimant, not so appointed. We confidently assert that there is nothing in the statute itself to suggest such a legislative coup, that there is much to show that such was not the legislative purpose, and that the statute, if so intended and so construed, is plainly unconstitutional.

The first section (105) in article 5-C is headed "Definitions". It is not in form or meaning a preamble or legislative finding of fact. It defines two terms used elsewhere in the article: "Russian Church in America" and "Russian Orthodox Church". The long, one-sentence definition of the first of those terms says that, as used in the article, it means those churches, cathedrals, parishes, etc., which were known as the Russian American Mission of the Russian Orthodox Church from 1793 to 1870, then known as the Diocese of Alaska, etc., from 1870 to 1904, then as the Diocese of North America and the Aleutian Islands from 1904 to 1924, and which have been known as the Russian Orthodox Greek Church of North America since 1924, and which were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until 1917, later the "Patriarchate of Moscow", but which, now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four". A "Definition" of a term is a precise statement of its meaning. Nothing could be more precise than the statement (above summarized) which the Legislature thus gave us of what the Legislature meant by the use in article 5-C of the term "Russian Church in America". The definition describes, by reciting its history, the particular "group" of churches intended to be affected by the article. So read, the definition cannot possibly mean anything but this: that the "group" of churches or parishes thus recognized by the Legislature under the name "Russian Church in America", were those particular churches and parishes which were formerly part of the unified body called at successive times first the "Russian American Mission", then called the "Diocese of Alaska and the Aleutian Islands", then styled the "Diocese of North America and the Aleutian Islands",

and which have been called the "Russian Orthodox Greek Catholic Church of North America" since 1924—in other words, the secessionists. To make that totally clear, the Legislature added to its "definition" a statement that it meant those churches, cathedrals or parishes which, though formerly subject to the Moscow Patriarch, had created themselves into an autonomous metropolitan district (or diocese) in April, 1924. On the trial, the witnesses agreed that not all the American parishes of the Russian Orthodox Church have gone over to the new "American" church. The definition describes those who did so cross over. The second "definition" in section 105 (of "Russian Orthodox Church") says that term means a church, cathedral, etc., founded and established with the purpose and intent of adhering to the new metropolitan district.

The next section (106) or article 5-C sets forth the formalities for incorporation of a "Russian Orthodox Church", as defined in section 105. Section 107, as amended in 1948, prescribes the method of government, by the new "Russian Church in America" of "every Russian Orthodox Church in this state", whether incorporated before or after the creation of the new "autonomous metropolitan district". Appellant seizes upon the words "every Russian Orthodox Church in this state" as meaning, literally, every Russian Orthodox parish, church or cathedral, whether or not it has seceded, and whether or not it desires to retain its traditional ties with the Patriarch. Of course, the words must be limited as defined in section 105, which says precisely what they are to mean, when "used anywhere in this article".

Section 108, headed "reincorporation of existing corporations" authorizes the reincorporation "under the provisions of this article", of any "heretofore incorporated Russian Orthodox Church". Such a provision would be useless and meaningless if the Legislature had, by the previous sections of the article, put every Russian Orthodox church and parish, automatically, into the new, dissident, "Russian Church in America". Indeed, if so strange and ruthless a plan had been intended by the Legislature, section 105 itself ("Definitions") would have been meaningless and

unnecessary since, with all included, there would be no need for any definition or limitation.

Article 5-C, we think, is so plain and clear as not to need or permit any construction beyond the patent meaning of its simple words (*Matter of Rathscheck*, 300 N. Y. 346, 350). But if construction were permissible, every known canon of construction would lead to the same result: that the Legislature could not have intended this as a statute of outlawry, ouster, or disestablishment. Words in a statute are to receive their natural and obvious meaning; the general purpose and spirit of the law is to be kept in mind; objectionable consequences, injustice and unreasonableness are to be avoided; acts will not be so construed as to accuse the Legislature of a purpose to do harm (see McKinney's Cons. Laws of N. Y. Book 1, Statutes [1942 ed.], §§ 94, 96, 141, 143, 146, 148, 151, and cases cited for these propositions). A bad result suggests a wrong construction (*People ex rel. Beaman* v. *Feitner*, 168 N. Y. 360, 366). We find another aid to construction in the very practical idea that the busy New York Legislature which enacted over 1,200 laws in 1945, and which had no committee reports or debates as to article 5-C, was entitled to believe that this law meant what it said, without hidden purposes.

And one of the most urgent of all the canons of construction is this one: that a statute must be construed, when possible, "in manner which would remove doubt of its constitutionality, and possible danger that it might be used to restrain or burden freedom of worship or freedom of speech and press" (*People* v. *Barber*, 289 N. Y. 378, 385). Put another way, the rule is that the construction, if at all possible, must be such as not only to avoid unconstitutionality but to avoid grave doubts thereof (*Matter of Cooper*, 22 N. Y. 67, 87, 88; *Kovacs* v. *Cooper*, 336 U. S. 77, 85; *Tauza* v. *Susquehanna Coal Co.*, 220 N. Y. 259, 267; *People* v. *Realmato*, 294 N. Y. 45, 50; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401). How can there be any dispute but that this article 5-C, if read so as to take this archbishopric from the control of the central church and give it to appellant's group, is unconstitutional? *Watson* v. *Jones* (*supra*), does not use the precise word "unconstitutional" but the opinion, con-

trasting American with old world systems (see p. 728 *et seq.* of 13 Wall [U. S.], says that "in this country the full and free right to entertain any religious belief, to practice any religious principle" finds expression in the American rule of law that the determinations of the tribunals and judicatories of a centrally-organized church are absolutely binding on the civil power. The modern Supreme Court in *Everson* v. *Board of Educa.* (330 U. S. 1, 13), has cited *Watson* v. *Jones* (*supra*), as authority for the proposition that the First Amendment provides "protection against governmental intrusion on religious liberty" through statutes. It is no answer to this charge of unconstitutionality that there is here in dispute a "property right" only as to the use of a building. "* * * when rights of property are dependent upon the questions of doctrine, discipline or church government, the civil court will treat the determination made by the highest tribunal within the church as controlling" (*Baxter* v. *McDonnell*, supra, 155 N. Y., 83, 101, citing *Watson* v. *Jones, supra;* and *Connitt* v. *Reformed Protestant Dutch Church of New Prospect, supra;* see *Gonzales* v. *Archbishop of Manila*, 280 U. S. 1, 16).

We pause to remark on the notable similarity between the present case and *Watson* v. *Jones* (*supra*). A controversy over slavery split the Presbyterian Church in Kentucky in the 1860s; dissension over communistic ideologies and Soviet controls played their part in the internecine warfare which broke out among the American members of the Russian Orthodox Church. A faction withdrew from the central control in the Presbyterian Church; plaintiff's faction here divorced themselves from their supreme hierarch. In *Watson* v. *Jones*, the Supreme Court, holding the Presbyterian controversy to be "a case of division or schism in the church" (p. 717), as is surely true of our case, made the classic statement of law which runs from page 722 to the end of the long opinion. The holding as between the dissenters and the central organization was summarized thus: "They [the schismatics] now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different,

if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or the use of it, which is the subject of this suit" (p. 734).

Going back to the statute (art. 5-C) and its supposed effect here, we have, fortunately, the strongest kind of proof from the Religious Corporations Law itself that the Legislature never intended for article 5-C the meaning and result now ascribed to it. In 1943 (ch. 145 of that year) the Legislature, two years before it set up article 5-C, had enacted a new article XV of the Religious Corporations Law and had, concurrently, amended subdivision 3 of section 15 of the Religious Corporations Law. That 1943 legislation described and recognized a "Federation" of the "Four Primary Orthodox Greek Catholic Jurisdictions in America", being the churches, congregations, etc., recognized by the "apostolic historic Orthodox Patriarchates of Constantinople, Antioch, Moscow and Serbia (Jugoslavia)". Among other things, that 1943 law described the processes whereby new congregations adhering to the four historic patriarchates could be newly incorporated or reincorporated as member churches of the federation. The significance for us is this: as late as 1943, the Legislature was thus legislating as to those churches which were under the government of the Moscow Patriarch. The Governor of New York, after signing the bill, made it clear that he so understood its import. In a speech at Buffalo (see Public Papers of the Governor, 1943, p. 550) Governor Dewey said: "For more than one hundred and eighty years members of the Greek Church have been on what is now American soil. We find in the records that as long ago as 1763 a native of the Aleutian Islands was converted by a devout and hardy missionary from Russia. Nineteen years later the Holy Synod sent a mission of eight monks to Alaska and in 1794 they established missionary headquarters on the Kodiak Island. Three years later the hierarchy of the Greek Church consecrated a Bishop of Alaska, but he perished at sea before he could ever reach his diocese. The living successor of the reverend prelates who succeeded

him is The Most Reverend Metropolitan Benjamin of New York. It is an interesting historic fact, particularly in these days, that his full title is Metropolitan of the Archdiocese of the Aleutian Islands and North America."

The Most Reverend Metropolitan Benjamin whom the Governor thus saluted as the successor to the historic line of Orthodox prelates in America was our defendant Benjamin.

Thus we see that in 1943, by article XV and the amendment to section 15, the Legislature dealt with those Orthodox churches which remained loyal to the Patriarch and in 1945 and 1948, through article 5-C, gave its attention and recognition to the new, nonconformist "American Church". There is no slightest sign that the Legislature intended the later statutes to repeal the earlier. We should not strain to discover a repeal by implication but must read these statutes as harmonious parts of a whole and assume that the Legislature in 1945 knew what it had done in 1943 (*Matter of Cooper, supra*, 22 N. Y. 67, 88; *Chase* v. *Lord*, 77 N. Y. 1, 18; *Matter of Tiffany*, 179 N. Y. 455, 457; *Matter of Timmis*, 200 N. Y. 177, 181; *Betz* v. *Horr*, 276 N. Y. 83, 88; *Morris Plan Ind. Bank of N. Y.* v. *Gunning*, 295 N. Y. 324, 331). "The intent and purpose of the legislative commands must be found from the statutes relating to the same general subject-matter taken as a whole" (*Betz* v. *Horr*, *supra*, p. 88). "If by any fair construction, whether strict or liberal, a reasonable field of operation can be found for both acts, that construction should be adopted. In other words, if the old and the new law, by any reasonable interpretation, can stand together, there is no repeal by implication" (*Matter of Tiffany, supra*, p. 457). The Legislature in 1943 dealth with the patriarchal church, in 1945 with the American church, and there is no repugnance, inconsistency, or over-lapping of the two sets of statutes.

A final comment:

In the long run, communist repression and abuse of religion will make religion stronger, for "the blood of the martyrs is the seed of the Church". And so with government interferences with churches in our country. But with us the loser will be a traditional principle of American

Government: that the inner affairs of religious bodies are no concern of the state.

Lewis and Dye, JJ., concur with Conway, J.; Froessel, J., concurs in separate opinion in which Lewis, Conway and Dye, JJ., concur; Desmond, J., dissents in opinion in which Loughran, Ch. J., and Fuld, J., concur.

Judgments reversed, etc.

The judgments should be affirmed, with costs.

Lewis, Dye and Froessel, JJ., concur in opinion by Conway, J.; Lewis, Conway and Dye, JJ., concur in separate opinion by Froessel, J.; Desmond, J., dissents in opinion in which Loughran, Ch. J., and Fuld, J., concur.

Judgment reversed, etc.

EXHIBIT C

Opinion of Callahan, J. Supreme Court, Appellate Division—First Department. June 1949. Edward S. Dore, J. P., Albert Cohn, Joseph M. Callahan, John Van Voorhis, Bernard L. Shientag, JJ. Saint Nicholas Cathedral of the Russian Orthodox Church of North America, Appellant *v.* John Kedroff and Benjamin Fedchenkoff, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents. 2423.

Appeal by plaintiff from a judgment entered in the Supreme Court, New York County, dismissing the complaint on the merits after a non-jury trial.

Ralph Montgomery Arkush for appellant.

Philip Adler for respondents.

Callahan, J.: This action in ejectment involves a dispute over the right to possess and use certain church property known as Saint Nicholas Cathedral of the Russian Orthodox Church located on East 97th Street in the City of New York. The dispute has its origin in a break or schism within that church following the Bolshevik revolution in 1918.

Prior to that time the Russian Orthodox Church was a world-wide religious denomination which had existed for 900 years with its headquarters in Russia. It has also variously been known as the Christian Orthodox Catholic Church of the Eastern Confession and the Christian Orthodox Greek Catholic Church.

The adherents of this faith spread to the United States about a century ago and eventually parishes were established in the city of New York.

In 1903 the Saint Nicholas Cathedral was erected with money furnished by the central church authorities in Russia. It was to be used as the episcopal see of the diocese of North America. Title to the property was taken by Russian Orthodox Saint Nicholas Church in New York, a corporation organized under the Religious Corporations Law. Under its charter this corporation was to be controlled by two trustees who were to be the Russian Ambassador and the Russian Consul General to the United States.

The Russian Orthodox Church was a centrally organized one and the archbishops or metropolitans who occupied the cathedral prior to 1918 were appointed pursuant to canon law by the controlling church authorities in Moscow and were answerable only to such authorities.

Historically the head of the Russian Orthodox Church was the Patriarch but from the time of Peter the Great to the Kerensky rebellion the czars had forbidden the calling of any "Sobor" which was the traditional convention of church delegates authorized to elect a patriarch. As a result during this long period no patriarch had held office and the church was governed by the Holy Synod a member of which was the Chief Procurator, who was the representative of the czars.

In 1917 the Kerensky government permitted a sobor to be called in Russia. It elected one Tikhon as patriarch. A year or two later the Bolshevik revolution occurred. Religion was proscribed and Tikhon was imprisoned.

As a sequence to the antagonism of the Soviet government to religion and its persecution of church dignitaries, many of the American adherents of the church decided to separate from the mother church administratively though

adhering to it spiritually. In 1924 they held an American "Sobor" in Detroit and selected one Platon Rodjesvensky as American archbishop or metropolitan. The asserted authority for the holding of this American diocesan sobor was a certain ukase—issued by Tikhon from his prison, but this decree by its terms would seem to be limited to dioceses in Russia. In any event the right of local self-government was clearly a temporary measure effective only until the central church was restored.

In the meantime in 1923 another "Sobor" had been permitted to be called in Russia. It selected a "*locum tenens*" or temporary head of the central church. There has always been some dispute among churchmen as to canonical validity of this sobor. About 1924 one Kedrovsky appeared in New York claiming to be the Metropolitan appointed by the Central Church authorities. Litigation was commenced in 1925, between the forces of Platon and those of Kedrovsky over the right to possess the cathedral which eventually reached this court and the Court of Appeals (*Kedrovsky* v. *Rodjesvensky*, 214 App. Div. 483, affd. 242 N. Y. 547).

Although Special Term ruled in that case in favor of Rodjesvensky and the American group this court reversed that decision and gave judgment in favor of Kedrovsky and the Central Church enjoining Platon Rodjesvensky from occupying the cathedral and that judgment was affirmed by the Court of Appeals. In that action both sides had claimed that the respective archbishops supported by them had been appointed by the central church authorities. Rodjesvensky claimed an oral designation by Patriarch Tikhon and Kedrovsky claimed to have a written appointment signed by that patriarch and also that his appointment was approved by the church dignitaries elected in the sobor held in 1923. The canonical validity of that sobor was one of the issues litigated in the former suit. This court upheld its validity at least as a de facto "Sobor" or convention. However, the parties to the present litigation all contend that the 1923 sobor was not canonically valid because, among other reasons, it was not universal or world-wide in character. We do not see that this ques-

tion of validity of the 1923 sobor alters the weight to be given to the earlier decision. The principle that controlled that decision was that the right to appoint the American archbishop was vested in the central church authorities.

After the decision in the earlier case by Special Term and before it was reversed by this court, a special act was adopted by the legislature (Laws of 1925, Chap. 463) incorporating plaintiff. This act provided that Russian Orthodox Saint Nicholas Church in New York might convey the cathedral property to plaintiff which was controlled by Platon Rodjesvensky and his followers in the American church. Thereafter a deed was executed purporting to convey the cathedral property from the old corporation to the new, but this deed was executed by only one of the two trustees. One of the issues presented in this case concerned the validity of that deed. We find, however, that it is unnecessary to discuss that issue as the question of legal title is not controlling.

For twenty years or more after the prior litigation Kedrovsky and his successors continued to occupy the cathedral on behalf of the mother church. In 1927 the Soviet government had permitted the Russian Orthodox Church to resume activities, but under a pledge of loyalty to the Soviet regime. In referring to this church as it existed from 1918 to 1927, the parties designate it the "Renovated" church as distinguished from the "Patriarchal" church.

In 1945 another sobor was held in Russia. It was world-wide in character and some delegates from the separated American group attempted to attend it. They did not reach Moscow in time, apparently due to interference by Soviet civil officials. But, a new patriarch, one Alexi was elected by this sobor, and the American church now recognizes him as the spiritual head of the Russian Orthodox Church. The American church on several occasions since 1945 has petitioned the patriarch to reunite the two churches but has insisted on the right of the American church to elect its own archbishop. Up to the time of trial of this action, efforts to effect reunion continued but the churches have never been able to agree on the question of autonomy, the authorities of the central church insisting on their right,

under canonical law, to appoint the American archbishop. It appears that in number the adherents of the American group or church largely exceed those in this country continuing to be connected to the Moscow patriarchate but in a church that is centrally organized the matter of numbers is not controlling on questions of church procedure (*Watson* v. *Jones*, 80 U. S. 679; Zollmahn, American Civil Church Law, pp. 178-185, 190-193, 197).

After Platon Rodjesvensky's death in 1934, one Theophilus was elected American archbishop by an American convention. Defendant Benjamin Fedchenkoff succeeded Kedrovsky upon the latter's death, having been appointed American archbishop by the central authorities of the church in 1934. His appointment has since been ratified and confirmed by Patriarch Alexi. These two dignitaries are the controlling archbishops involved in the present action which was commenced a day before certain legislation affecting the issues was enacted in New York in 1945 (Laws 1945, Chap. 693).

The present action took the form of a suit in ejectment and the parties discuss in the briefs the question of whether such a suit will lie and whether it is barred by the statute of limitations, but we feel that it is necessary to discuss only the principal issue as to whether, as contended by plaintiff, the archbishop selected by an American convention or, as contended by defendant, the one appointed by the central church authorities in Russia had the right to the use of the cathedral.

Special Term decided the issues in the present case in favor of defendants, representing the central church, thus following the principle enunciated in *Kedrovsky* v. *Rodjesvensky* (*supra*). It held that the 1945 statute did not lend any support to plaintiff's claim of its right to possess the cathedral. It applied the rule of common law that whenever a part of a centrally organized church breaks away to form a new society the temporalities are to be administered according to the rules of the ecclesiastical body to which the church corporation is subject. (*Westminster Church* v. *Presbytery of New York*, 211 N. Y. 214), and the further rule of common law that in a centrally

organized church whenever questions of discipline or ecclesiastical rule have been decided by the highest church tribunal within the church, the civil courts will treat that ruling as controlling (*Watson* v. *Jones, supra; Baxter* v. *McDonald,* 155 N. Y. 83).

The principal if not the sole contention advanced by plaintiff-appellant on this appeal is that Special Term misconstrued the 1945 statute. Before discussing that question we must note that after the decision by Special Term the 1945 statute was amended by Laws of 1948, Chapter 711. We will assume upon this appeal that plaintiff is entitled to the benefit of the law in its amended form (see *Gilpin* v. *Mutual Life Ins. Co.,* 299 N. Y. 293).

These two statutes added a new Article 5-C to the Religious Corporations Law, the general purpose of which was to define the Russian Church in America and to provide a procedure for the incorporation of churches to be affiliated with it.

Plaintiff points to several provisions in Article 5-C which it contends indicate that the purpose of the legislature was to declare that the American church has the right of autonomy in its relations with the Russian Orthodox Church. It contends that this statute warrants a judgment in its favor awarding it possession of St. Nicholas Cathedral.

First, plaintiff points to the provisions of Sec. 105 of Article 5-C of the Religious Corporations Law reading:

> "The Russian Church in America, as that term is used anywhere in this Article, refers to that group of Churches, Cathedrals, Chapels, Congregation Societies, Parish Committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church), which were known as * * * (d) Russian Orthodox Greek Catholic Church of North America since in or about nineteen hundred twenty-four; and were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention

(sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four."

It contends that this constituted a declaration by the legislature of this state that the American church was entitled to autonomy in its relations with the central church.

While this definitive section is far from a model of clarity, we find nothing in it to support the claim of plaintiff that the legislature intended to determine the issue of ecclesiastical autonomy existing between the two branches of the church. The clause found in the definition is merely descriptive in its historical reference to the administrative autonomy of the "Russian Church in America". Section 105 proceeds through subdivisions "a", "b" and "c" to refer to the groups constituting the earlier American church by reciting historical events connected with the development of the church in America, first as the American mission of the central church and then the American diocese of said church. In referring to the separation of the American church from the church in Moscow in 1924, subdivision "d" recites the historical events connected with that separation and refers to the purport of certain resolutions adopted at the Detroit convention for the autonomous status of the separated church. It does not purport, according to our construction, to set forth any legislative *finding* determining the ecclesiastical dispute as to the right of autonomy. At most it amounts merely to a legislative recognition of the fact that the American branch or "Metropolitan District" asserted its independence in administrative affairs in this country. It should not be construed to mean that the legislature has taken sides in the religious controversy as to the right of autonomy, involving the right to appoint or elect archbishops dependent as it is on the canon law of the church. Such a construction would show an intent by the legislature to interfere in ecclesiastical concerns which is hardly within the competence of legislative action (U. S. Constitution, 1st Amendment; New York Constitution, Art. I, Sec. 3), and certainly would be a departure from the traditional American principle of

separation of church and state. As was said in *McCollum v. Board of Education*, 333 U. S. 203, 212, in discussing the first amendment of the federal constitution:

> "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Plaintiff then points to the provisions of Sec. 107 of Art. 5-C, claiming that they indicate a legislative intention to grant jurisdiction or authority to the American church over every Russian Orthodox church in the state, even those established prior to the creation of the "Metropolitan District" and never affiliated with the new group and to grant control to the American church over property of churches adhering to the ecclesiastical statutes or rules of the central Russian Orthodox church in Russia.

The provisions of Sec. 107 that every Russian Orthodox church incorporated before or after the creation of the autonomous "Metropolitan District" shall recognize and be subject to the jurisdiction of the governing authorities of the "Russian Church in America" must be read in the light of the definition of the "Russian Church in America" as set forth in Sec. 105. In other words, it appears to us that it was intended to mean that any church heretofore or hereafter incorporated for the purpose of adhering to the American church must be subordinate to the rules and the decisions of the authorities of the governing bodies of that church. Surely it was not intended to mean that Russian Orthodox churches formed for the purpose of adhering to the Moscow Patriarchate must be subordinate to the American church.

The control given trustees of the temporalities of the Russian Orthodox church in subd. 3 of Sec. 107 must be likewise limited. This subdivision does not purport to grant control to the "Russian Orthodox Church in America" to St. Nicholas Cathedral or any other property of the mother church. The general scope and purpose of the Religious Corporations Law is to authorize the creation of religious corporations as secular agencies to aid in the

conduct of church business and affairs, including the acquisition, holding and disposal of property (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462). But the state attempts no interference with the practices and rules of any spiritual body in the matter of its temporalities. We find no departure from this general policy in the provisions of Article 5-C. Sec. 107(3) simply provides that the trustees of a Russian Orthodox church (meaning Russian Orthodox Church in America) shall administer its own temporalities in accordance with the rules of the "Metropolitan District". We can find no suggestion in the present Article of any intention to transfer any beneficial interest of a religious trust in the St. Nicholas Cathedral to the "Russian Orthodox Church in America" contrary to the wishes of the supreme ecclesiastical authority of the beneficiary church.

That the legislature did not intend by these statutes to strip the Russian or central branch of the church of its property in New York is further evidenced by the fact that in other sections of the Religious Corporations Law the legislature has recognized the mother church in Russia as a living ecclesiastical body and has granted the Moscow Patriarchate certain powers with respect to church affairs (see Religious Corporations Law, Sec. 15, subd. 3; id. Art. 15; added by L. 1943, ch. 145). That these separate provisions with respect to the Moscow Patriarchate and the Russian Church in America are concurrently carried in the same statute indicates a legislative recognition of two separate and independent churches to both of which the legislature has granted the right to incorporate churches, conduct their own affairs and hold their own temporalities.

This brings us to consider the views expressed by our dissenting brethren. First, they disagree with our construction of Art. 5-C of the Religious Corporations Law, construing it, as does the plaintiff, to contain a grant of autonomy and a declaration in effect that the American church is entitled to the temporalities of all Russian Orthodox churches in this state. We have already dealt with this subject. Then they have taken a position which

we find that plaintiff does not contend for, which is in effect that the Russain Orthodox church in Russia is not a true church but a mere instrumentality of the Russian government, made so by the subservience of the high church authorities to that government and that therefore the American church is the only true Russian Orthodox church and has the right to possess the cathedral. In support of this theory the dissenting opinion proceeds with great vigor to attack communism, the prevailing political creed in Russia today, as atheistic and the Soviet government as a totalitarian despotism, and concludes that in fact no real religious activity would be or is permitted in Russia. They arrive at the determination that the present Russian Orthodox church is not a real, but merely a sham or phantom, church deprived of all power of action in respect to its followers and property in America by duress imposed by the Soviet State.

The dissenting opinion sets forth at considerable length the antireligious ideologies of communism, points out and condemns the totalitarian rule of the Soviet state and then concludes that any church that has pledged loyalty to such a government is not a true religious organization. The conclusion drawn is that a judicial finding is warranted that there is no restored Russian Orthodox church in Russia today. We concur entirely with the views of our brethren attacking communism. We yield nothing to them in their condemnation of the lack of religious freedom in Soviet Russia, but we disagree with the conclusion drawn as to the non-existence of the Russian Orthodox Church in Russia, because we believe that we may not draw that conclusion on this record, even if we might desire to do so.

We are dealing with a judicial action and we do not act on suspicion or news reports; we act solely on legal proof. We must consider the contentions of the parties and the proof they have chosen to submit except as to matters concerning which we may take judicial notice. Here, both parties have taken the position that the Russian Orthodox church is presently restored in Russia. Plaintiff introduced proof that since the last World War greater rights have been afforded to the Russian Orthodox church in Rus-

sia. Its witnesses recognized the 1945 sobor as authentic and as restoring the Moscow Patriarchate and accepted the restoration of the traditional church as a fact. Plaintiff makes no suggestion that the restored church is a new or different church, a mere state agency, as suggested in the dissenting opinion. Plaintiff and the American Russian church it represents choose to treat the Patriarchate Alexi as a holy man, a church leader and the Holy Synod as an existing hierarchy. The American church has repeatedly petitioned the Russian Church authorities to re-unite the American church to the mother church. Right down to the time of trial of this action, negotiations were proceeding for this rapprochement. The fact that the mother church was required to pledge loyalty to the Soviet civil regime and had agreed not to attack communism from the pulpit was apparently considered no obstacle to reunion. The only factor causing cleavage seems to be the insistance of the American church on its right to elect its own archbishop and the refusal of the mother church to yield that right unless at least the power of veto of any selectee was reserved to the high church authorities.

The plaintiff and the American church that it represents does take the position, as we understand it, that the "Renovated" church was non-canonical. But we are dealing with the church since 1945. Plaintiff recognizes the domination of the Soviet civil authorities over the present church and deplores its pledge of loyalty to the Soviet regime but concedes nevertheless that the old Russian Orthodox Church has authentically been restored at least since the 1945 sobor and is presently an existing though subjugated church. Perhaps this belief is fostered in whole or in part by religious convictions instilled by a faith that has been accustomed to look up to a mother church in Russia for the past 900 years. Plaintiff and those it represents certainly have the right to decide whether or not to believe in the existence of a true church and the genuine spiritual qualifications of its heirarchy. That judges may suspect that the parties have a wrong conception of what is going on in the church in Russia today is wholly immaterial. The parties have been in direct consultation with the representa-

tives of the church in Russia. Whether these church heads are truly religious men trying to keep the faith alive and to serve the religious needs of their people of Russia to the best of their ability or whether they are wiling and served tools of an anti-religious government is not to be decided by this court adversely to the contentions of the parties on any theory that we may take judicial notice of actual conditions behind the "iron curtain" in Russia today. Such matters are not so notorious as to be subject to the rule of judicial notice.

When we accept the attitude of the parties as to the existence of a restored Russian Orthodox Church in Russia today, the issue presented in this case becomes a simple one and the rule of law controlling its decision is plain. The law requires us to hold that the decision of the church judicatories on the question of whether bishops must be appointed or may be elected must be controlling on us, and the right to use the cathedral would rest in the archbishop selected by those judicatories.

While the importance of this decision cannot be gainsaid, we are unable to agree with our dissenting brethren as to its scope or effect. It involves no question of the denial of religious freedom to any group nor is any group being ousted from its place of accustomed worship. The forces behind the plaintiff in this case have not been in possession of Saint Nicholas Cathedral since the decision in the Kedrovsky case (*supra*) almost a quarter of a century ago. The present determination does not reach beyond the right to use and control a single church property built and maintained with funds supplied by the mother church in Russia. This decision is at least partly controlled by New York statute law which can have no extraterritorial effect. If and when it should appear that the Russian Orthodox Church is no longer existent in Russia or if and when the legislature of this state may make appropriate disposition of property within this state found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the legislature and no proof offered to this court that the

trust purposes for which plaintiff holds the cathedral have been extinguished or terminated.

Meanwhile plaintiff holds at least the nominal legal title to the property involved. For as long as it may continue to do so the plaintiff remains in a position to protect whatever claims the American church may have to the cathedral.

Accordingly, we have reached the conclusion that the defendant is entitled to prevail.

The judgment appealed from should be affirmed.

COHN and SHIENTAG, JJ., concur.

Opinion of VAN VOORHIS, J. SUPREME COURT, APPELLATE DIVISION—FIRST DEPARTMENT, JUNE, 1949. EDWARD S. DORE, J. P., ALBERT COHN, JOSEPH M. CALLAHAN, JOHN VAN VOORHIS, BERNARD L. SHIENTAG, JJ. SAINT NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH OF NORTH AMERICA, Appellant, *v.* JOHN KEDROFF and BENJAMIN FEDCHENKOFF, as Archbishop of the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church, Respondents. 2423.

VAN VOORHIS, J. (dissenting): The dissenting justices concur with the majority, nor is there disagreement in the court, in condemning the attitude and conduct of the government of the Soviet Union toward religion. The difference in opinion relates entirely to whether, in view of the canons, ecclesiastical practices and history of the Russian Orthodox Church, the law of New York State requires that the material possessions of its American branch must continue to be administered from Moscow while the Patriarch and Holy Synod there are as plaintiff contends dominated and controlled by the Soviet atheistic regime. Our dissent is based upon the view that the law does not require this result.

The immediate subject of this action is the right to occupancy and control of St. Nicholas Cathedral on East 97th Street in New York City. In order to decide that question, it is necessary to determine who at this time is deemed to be in administrative control of the Russian Orthodox Church in America, since that official is entitled to occupy

and control the cathedral. The outcome of this suit therefore depends upon who is to have charge of the temporalities of the entire Russian Orthodox Church on this continent, including churches, parish houses, rectories and revenue producing properties. Plaintiff represents a large group of Russian Orthodox churches which have proclaimed the independence of the American branch from administrative control by the central church authorities in Moscow while dominated by the Soviet state. Defendant Benjamin Fedchenkoff has been designated by the Patriarch while under such domination as archbishop and metropolitan to rule over the Russian Orthodox Church in the United States and elsewhere in North America. The autonomous group has created no doctrinal schism, and its members desire to worship in their ancestral churches according to their ancient forms, but without being subject to administrative control by a central organization which has become subservient to the Soviet state. The judgment appealed from, in denying to plaintiff the occupation and control of St. Nicholas Cathedral, necessarily determines that plaintiff and its affiliated churches to which belong most of the communicants of the Russian Orthodox Church in the United States, have lost the right to the enjoyment of their properties while they continue to refuse to recognize the administrative acts of the Russian central church authorities.

It seems to us that, instead of being schismatics, the group in American to which plaintiff belongs is adhering, in so far as possible, to the Orthodox tradition, from which the Russian high church authorities departed when, yielding to force, they accepted what might be termed the Russian Orthodox Church of the Communist Obedience. These ecclesiastical officials, in Moscow, having become in fact an instrumentality of the Soviet Government, have ceased to function as the church tribunal to which the civil courts must look in ordering disposition of temporalities in this country, and the conventions (sobors) of the Russian Orthodox Church in America have, for a period of indefinite duration, taken their place as the authority to be followed by us respecting property of the Russian Orthodox Church

within this jurisdiction. The New York State Legislature has recently so declared in clear and, as it seems to us, unmistakable terms (Chapter 817 of the Laws of 1945; Chapter 711 of the Laws of 1948).

Although the Church in Russia was aided financially and subjected to political influence by the czars, one is not justified in assuming, nor does the majority opinion go so far as to state, that the Orthodox Church in Russia was ever before sought to be reduced by government to a condition approximating that of being a mere communist front. The majority opinion admits that religion was proscribed and the Orthodox Church in Russia persecuted by the Soviet Government.

This record and facts to which we may not blind ourselves show that religious liberty in Soviet Russia is nonexistent; that the Church has lost its independence and freedom of action under superimposed political pressures; that the government in Russia does not permit freedom of activity to the Church itself or its judicatories; that the political creed of the controlling power in Russia is essentially atheistic; that the Soviet regime is anti-religious; that the supreme church authority in Russia has pledged itself to the government of the communistic atheistic state, and the Church in Russia is under involuntary restraint of the civil authorities. In such state of facts, how can it reasonably be said that the central organization of the Orthodox Church in Russia is able to function as the governing entity of a Christian religious society? If neither the church nor its head are free, their administrative acts are not their own but those of the Soviet state.

It is fundamentally erroneous to treat St. Nicholas Cathedral and the parishes comprising at least four-fifths of the Russian Orthodox churches in the United States as schismatics, for the reason that the desire to retain their ancient faith and order, unmolested by the group which has seized power in Russia, and has seized the church for its own uses. The repeated efforts of these American communicants to achieve some tangible expression of their spiritual unity with believers in Russia, but without being subject to the formal functioning of the central church or-

ganization as a department of the Russian state, should count in their favor in this action. Their adherence to tradition is one of the indications that they are not the chief divisive element, but rather that, in truth and in fact, it is the church in Russia that has been constrained. The distinction between spiritual communion in faith and administrative control must be kept in mind. Christianity cannot permanently be suppressed in Russia. That is something which principalities and powers have been unable to accomplish from the beginning. But it is hardly facing the facts if one fails to realize that the present Russian government has done and is doing all that is politically possible to extirpate it, except as a mere form for purposes of Soviet aggrandizement, and that such persistence as the religion has manifested there since the Revolution has come from the bottom up rather than from the top down. The problem *sub judice,* as both the trial court has held and as this court is holding, concerns the identification of the beneficiaries for whose use and enjoyment St. Nicholas Cathedral and the other temporalities in this country were dedicated. Instead of disputing the trust principle, the plaintiff stands upon it. The difference in point of view is that plaintiff maintains that these temporalities are torn away from their intended use, if they are held to be subject to the jurisdiction of officials who could not function in Moscow, whatever pious names they bear, except on the dictates of a government whose every action indicates that its political philosophy is based upon the destruction of what Christians of all denominations hold to be dear.

Recognition of these facts does not place the courts or the Legislature in the fields of theology or of ecclesiastical jurisdiction; it is necessary for the civil authorities to act upon them in ascertaining and identifying the "church judicatories" mentioned in *Watson* v. *Jones,* 80 U. S. 679, whose word in those fields is to be accepted as final in ordering the temporal concerns of religious corporations.

The statement in the majority opinion that the central church organization in Russia was sufficiently real for the Russian Church in America to deal with it and seek re-

union, is answered by the utter frustration of those efforts. The 1945 sobor in Russia was "universal" in character only if we ignore the subterfuge whereby the American delegates were detained in Siberia until the sessions of the sobor had been completed. This maneuver is not to be brushed aside as having been done by the Russian "civil" as distinct from ecclesiastical Authority. The Patriarch did not deplore but availed himself of it, refused to give a hearing to the American delegates, and handed them an uncompromising ultimatum upon arrival based upon action that had been taken in their absence. This incident illustrates the closeness of the connection between the civil and high ecclesiastical authorities.

That was the sobor at which the present Ruling Patriarch Alexi was chosen, who is to have rule over St. Nicholas Cathedral and the rest of the Russian Orthodox churches in the United States if the judgment below is affirmed. Always the American delegates safeguarded their declaration of administrative independence, by expressly adhering to their refusal to acknowledge any connection with the church in Russia as a formal functioning organization while under Soviet dominance. Reunion upon the terms of the American delegates would have required a fundamental change in the present relation in Russia between church and state. No such reform was forthcoming, and the situation remained as before. This willingness to be in spiritual communion amounted to no waiver of rights by the autonomous body in America. Neither did the 1946 sobor in Cleveland, Ohio, sacrifice administrative independence. Its effect was to reamphasize that no doctrinal schism separated the mass of believers in Russia and in the United States, but that there must be administrative independence while the identity of the church organization in Russia remains merged in the Soviet state. American members of the Russian Church are not responsible for what has happened in the Kremlin.

When the proposition is thus stated, it is beside the point that Soviet citizens are permitted to own property in the United States. That has no relation to whether St. Nicholas Cathedral and the other Russian Church temporalities in

America have been dedicated to the use of those who have been, or who desire to be, identified with the traditions of this religious society as they existed before its central organs were subverted by Soviet power.

In order to approach more closely to the problem presented for decision, it is necessary to review briefly the development of the autonomous group in America, culminating in the recognition by the Legislature of this group in 1945 and in 1948 as the successor to "that group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church) which * * * were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow, but now constitute an administratively autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan" in 1924 (Article 5-C, Religious Corporations Law, enacted by L. 1945, c. 493, and L. 1948, c. 711).

From April 2 to April 4, 1924, clerical and lay delegates of parishes of the Russian Orthodox Church of North America met in convention at Detroit, Michigan, to consider how to free themselves from Russian secular domination. The acuteness of their problem arose from the Russian revolution's character, and its impact upon the historical ties between Russian Orthodox churches in America and the ecclesiastical governing bodies or officials in Russia. The situation was complicated by the connection which had existed between the czarist government and the Russian church. The St. Nicholas Cathedral building on 97th Street, in New York City, involved herein, was constructed in 1903, with money some of which was supplied by the then czarist Russian Government and by the Church in Russia.

The old regime in Russia gave way to a new one which did more than expect political reciprocity from churches. It militantly proclaimed that religion is merely the opium of the people, that the soul of man has no significance, and

man himself none, except as merged in the State. So all-embracing are its claims, that it does not tolerate literature, art, music, science or religion except in complete subordination to and in the service of ends of the Soviet state. The office of patriarch was restored in 1917, but that important church dignitary, however much against his will, became a creature of the Soviet Government. "There is no doubt," said one of the delegates at the 1924 Detroit convention, "that we all stand for the patriarch. But, do you know that he would be thankful to us if we separated from him. By such an act we would relieve his heavy cross."

The delegates to this Detroit convention of 1924 recognized their underlying spiritual kinship with their Russian brethren, voted "not to break at all the spiritual ties and communion with the Russian Church, but always to pray for her good, give her every cooperation and mention the Most Holy Patriarch as the head of the Russian Mother Church to which the American Church is obligated for her existence", and they looked forward to a time when the relationship between the Russian and the American churches might be ordered by an œcumenical council of the entire Russian Orthodox church "with the participation of representatives of the American Church under conditions of political freedom, guaranteeing the fullness and authority for its decisions for the entire church"; but this convention resolved, nevertheless, "temporarily", until such a council could be convened, "to declare the Russian Orthodox Diocese in America a self governed Church so that it be governed by its own elected Archbishop by means of a Sobor of Bishops, a Council composed of those elected from the clergy and laity and periodic Sobors of the entire American Church." A procedure was authorized to establish "a new constitution of the American Church."

The use of the word "temporarily" is shown by the context to mean until, and not before, the dictatorship of the proletariat withers away, to an extent necessary to enable an œcumenical council to be held at which representatives of the American church can participate under conditions of political freedom.

The context shows that the mention of the Patriarch as the head of the Russian Mother Church, to which the majority opinion ascribes so much importance, was an expression of the reverence which the devout churchman has for the priestly office, that exists without relation to the conduct of the man who holds it. It is not clear by what reasoning it can be argued that in revering the office of patriarch, these American delegates were sacrificing the independence which they were at pains to assert as an essential condition of any rapprochement, nor that they were surrendering their well founded contention that the official acts of the patriarch are controlled by the Soviet state. No one is concerned with attacking the character of Patriarch Alexi for yielding to the demands of the Russian dictatorship, nor in praising him for casuistry in so doing. The determining fact, which stands out above everything else in the record, is that if Patriarch Alexi did not administer the Russian Church so as best to promote the spread of atheistic world communism, in the judgment of the Russian chiefs of state, he would quickly have been superseded by another who would have done so. If the directives of such an official are to be binding upon the traditional branch of the Russian Church in America, it has a just grievance.

A constitution was prepared and adopted by the autonomous Russian Church in America, and at a convention held in Cleveland, Ohio, November 20 to 23, 1934, Archbishop Theophilus Pashkovsky was elected metropolitan, and certain so-called normal statutes for parishes were adopted. If plaintiff-appellant is successful in this action, Archbishop Theophilus will conduct the religious services in the cathedral as metropolitan, as the duly selected head of the Russian Orthodox Church in North America.

In 1935 the Moscow Patriarchate issued a decree suspending Metropolitan Theophilus, and purporting to prohibit him from performing divine service "until either he repents or the ecclesiastical court shall have rendered a decision." The Patriarchate of Moscow had previously declared null and void the proclamation of the autonomous nature of the North American Diocese, which was described as "An act rudely violating Church Discipline." Defend-

ant--respondent Archbishop Benjamin Fedchenkoff was proclaimed by Moscow "as permanent Ruling Bishop of the Russian North American Diocese with the title of Archbishop of the Aleutian Islands and North America, also reserving to him the status of Exarch of the Moscow Patriarchate in America, and also granting to him the right to wear the cross on his Klobuk; to accept with recognition as such."

Thus, the outcome of this case involves more than whether Archbishop Theophilus shall conduct the services in the cathedral: on it depends whether the communicants of the Russian Church in America who refuse to submit to Soviet overlordship, shall within our jurisdiction have the use of the church buildings, revenues and other temporalities of their traditional church.

It is unnecessary further to detail the efforts of the American branch of the Russian Church to establish its administratively autonomous status, as shown by the record, nor to outline the particular steps by which the Soviet Government has pursued the policy of seizing the machinery of religion in order to control the minds of men. As phrased in the dignified statement of the American delegates, who vainly sought to achieve a *modus vivendi* on their mission to Moscow in January 1945: "It was no fault of the American branch of the Russian Orthodox Church that by force of circumstances it was compelled to establish its own church administration. It was no fault of the American Church that the Patriarchate laid a suspension on it because its clergy declined to give a pledge of loyalty to the Soviet power."

Respondents' position is lucidly and briefly stated in the motion by respondents' counsel to dismiss the complaint at the close of plaintiff's evidence at pages 268-278 of the record, and in the resume of the Gregory Tchukov testimony at pages 271-278.

The grounds that plaintiff cannot maintain an action for ejectment, and that this action is barred by the statute of limitations or laches, do no require comment. The decision of the trial term in not based upon them, and they are effectually answered in appellant's brief. The important

ground, upon which the decision of the case was made at trial term, is that plaintiff holds title to the St. Nicholas Cathedral properties on 97th Street, as trustee for the duly accredited archbishop appointed by the supreme church authorities in Russia, and that the case of *Kedrovsky* v. *Rodjesvensky* (214 App. Div. 483, affd. without opinion 242 N. Y. 547) held that an archbishop appointed by such authorities is the only person who has the right to possess, occupy and use that cathedral.

The Tchukov testimony is that as a result of enactment of a general convention (sobor) in Russia in 1917-18, the Patriarch and the Holy Synod, of which the Patriarch is the head, are the supreme authority of the Russian Church, that the American branch of the Russian Church is a diocese of the Russian Orthodox Church, and is ruled by an archbishop appointed by the supreme church authority which may suspend or remove such archbishop and appoint another in his place at its pleasure. He further stated that canon law, and the rules and usages of the Russian Orthodox Church, do not permit any diocese or any subdivision or constituent part of the church, for any reason whatsoever, to secede from or declare itself independent of the main branch of the church at large, or declare itself autonomous or a self-governing body or district. He testified that the action of the group of Russian Orthodox churches in America, and the resolution adopted by them in the convention in Detroit of 1924, and the purported election of the predecessor of Archbishop Theophilus as the archbishop of said churches violates these canons, rules and usages, and specifically he added:

> "Saint Nicholas Cathedral, in accordance with the rules and usages of the Russian Orthodox Church, must be possessed, occupied and used by the Archbishop of the American Archdiocese, who is duly appointed by the Supreme Church Authority, above referred to, namely, the Patriarch and the Holy Synod, and said Cathedral may not be occupied by any other official or person."

If this position, upheld by the trial court, be correct, it means that the courts and the Legislature are powerless to accord to these American communicants of the Russian Church the use of their accustomed church buildings, and other temporalities, unless they submit to the high church authorities in Russia, who are captive to the Soviet government. We think that this would be exalting form above substance.

In reversing the judgment appealed from and deciding in favor of the plaintiff as the representative of the autonomous Russian Church in America, there would be no conflict with the rulings in *Watson* v. *Jones* (80 U. S. 679) or *Trustees of Presbytery* v. *Westminster Church*, (222 N. Y. 305). Those cases hold, as sec. 5 of the Religious Corporations Law declares, that the "temporalities and property, real and personal," belonging to a religious corporation are to be administered "in accordance with the discipline, rules and usages of the corporation and of the ecclesiastical governing body, if any, to which the corporation is subject, and with the provisions of law relating thereto."

It is readily conceded that the rule no longer obtains in New York State that a religious corporation holds its temporalities free from regulation by any ecclesiastical authority, or by a tenure so independent that it could change its creed or denominational character without losing its hold upon its property (*Westminster Church* v. *Presbytery of New York*, 211 N. Y. 214).

Respondents are also correct in asserting that it was formerly the practice in the Russian Orthodox Church in America for its archbishops and bishops to be subject to administrative control by some higher church authority, although the composition of such authority has changed from time to time, as when the office of Patriarch was abolished in 1700 and so remained for two centuries until it was restored in 1917.

The essential point on which we consider that the trial court erred, and on which we differ with the majority of this court, is the failure to recognize that approval or direction by the high church authorities in Russia has lost all canonical significance, while those authorities have been

deprived of their freedom of action. It is as though they were constantly, and in all things, subject to duress, and subjected to duress by a government founded upon principles inimical to the existence of any Christian church. Their action or inaction is, therefore, nugatory.

"'Duress exists,' says Judge Cooley, 'when one, by the unlawful act of another, is induced to make a contract or perform some act under circumstances which deprive him of the exercise of free will.' *Hackley* v. *Headley*, 45 Mich. 569, 574, 8 N. W. 511. Duress by the government or its officers, in this class of cases, is defined by the supreme court as 'moral duress not justified by law.' *Maxwell* v. *Griswold*, 10 How. 242 256, 13 L. Ed. 405. It must be the pressure arising from unlawful acts or demands on the part of the government or its officers to produce that constraint of will or action, or state of necessity or compulsion, which render acts voluntary in form involuntary and void." (*Newburyport Water Co.* v. *City of Newburyport*, 103 Fed. 584, 594.)

Under conditions existing today, it would be an idle ceremony, void of all religious or ecclesiastical meaning, to call for approval by the so-called Supreme Church authorities in Russia of the selection of an archbishop to preside over the American branch of the Russian Church. The only theory on which such an act could signify anything, would be that the Russian government is exercising a lawful function in utilizing the machinery of church organizations, however deviously, to promote worship of the Russian state and its leaders. We cannot recognize the validity of such a procedure, especially where the purpose is clearly to use the Russian Orthodox Church in America as an instrument of foreign Soviet propaganda here. That such conduct, offensive to our public policy, has been engaged in by a government recognized by the United States, affords no reason why it should be upheld in our courts (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-9, citing *Baglin* v. *Cusenier*, 221 U. S. 580). This is in accordance with declarations of public policy by the State Department of the United States. In recent public pronouncements the State Department, and our representatives

in the United Nations, have frequently recognized and denounced the suppression of human rights and basic liberties in religion as well as in other aspects of life, existing in Soviet Russia and in all of its satellite states. The President of the United States has publicly characterized such efforts as a campaign to turn religion into a tool of the state (Armistic Day Address, November 11, 1949).

Even the intellectual and spiritual ties by which men are held together, are so controlled by the totalitarian state as ultimately to disintegrate all autonomous groups outside of the state itself, or the single political party that rules it. That technique is applied to scientific and cultural as well as to religious groups, so that ultimately no autonomous group with any independence remains. In the final analysis, the state and the state alone becomes all. It involves a retreat from reality if we do not clearly see that. In this case the technique of suppression, and the attempted use of a religious group merely as an instrumentality to serve the all-embracing and dominant ends of the Soviet state, is the real issue presented. The so-called "Russian church at large", so frequently mentioned by respondents, is in reality and unfortunately the Russian church group whose high ranking functionaries have been completely subjected and dominated by the men who control the Politburo, and the relatively small group that constitutes "the party", through whom the vast millions in Russia and Soviet-dominated satellite countries are regimented and controlled.

The case of *Kedrovsky* v. *Rojdesvensky* (214 App. Div. 483, affd. without opinion 242 N. Y. 547) has mistakenly been regarded as controlling. In that case, it is true, the same group now represented by plaintiff was defeated, and the representatives of a group styled as the "Living Church", "Renovated Church" or "Soviet Church", were held entitled to this cathedral. As a result of that decision, Archbishop Kedrovsky occupied it until his death in 1934, and his son, the defendant John Kedroff, remained there until his retirement ten years later. Archbishop Bejamin Fedchenkoff, whose right to occupation of the cathedral is confirmed by the judgment appealed from, does not claim through Kedrovsky, nor through his son, the defend-

ant John Kedroff. Respondents in this case concede that Archbishop Kedrovsky's appointment was uncanonical, and that the group represented by him had no standing and is now extinct. Thus, in the testimony of Tchukov, it is stated concerning the 1923 convention (sobor) in Russia, from which Kedrovsky derived his supposed canonical status: "This sobor is not regarded as having met with canonical requirements because it was not called by the Patriarch and the Holy Synod. However, within a few years thereafter, these Church movements subsided and practically all of the leaders, adherents and parishes of this Church joined with and were absorbed by the Patriarchal Church." He also stated that the resolutions of this sobor "shortly became a dead letter," and "that the constituent parties of the Sobor of 1923 shortly died out and the Patriarchal Church functioned effectively and without restraint."

When the case of *Kedrovsky* v. *Rojdesvensky* was in the courts, it evidently did not suit the purposes of the ruling power in Russia to furnish evidence to establish the lack of canonicity of the group which succeeded in that lawsuit. That circumstance should result in scepticism concerning the present assertion, that since the extinction of the winning faction in that action "the Patriarchal Church functioned effectively and without restraint." As stated by Lord Mansfield in *Blatch* v. *Archer* (Cowp. 66): "It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted" (quoted in II Wigmore on Evidence, section 285). It does not exceed the limits of judicial notice to recognize that in this action defendant Benjamin Fedchenkoff, like Kedrovsky in the prior action, had access in Russia to whatever helpful documentary or other evidence respondents needed, whereas the door to obtaining similar proof in plaintiff's behalf was undoubtedly closed, as it was to Archbishop Platon in the prior case. Were it to suit the purposes of the ruling caste in Russia at some future time to disavow the authority of Archbishop Benjamin, there is little doubt that the lack of it could be demon-

strated as effectively as has been accomplished in the case of Archbishop Kedrovsky, who appeared to possess the tokens of investiture when he was in court a quarter of a century ago.

Nevertheless, it is urged, and has been held, that the *Kedrovsky* case controls, on the theory that it established that whoever is to be the rightful incumbent of St. Nicholas Cathedral, must have obtained the approval of the Patriarch and Holy Synod in Russia.

In considering the *Kedrovsky* case, decided in 1925, it should be borne in mind that the relationship of the Russian government to churches was not and could not have been widely known, to the extent that has since been manifested in Russia and its satellite countries. The situation has become so obvious and acute that, since the *Kedrovsky* case was decided, the Legislature has recognized the administratively autonomous group established at the 1924 Detroit convention, and subsequent conventions, as being the traditional branch of the Russian Church in America. If *Kedrovksy* v. *Rojdesvensky* were otherwise held to be controlling, its effect would have been overcome by these Acts of the Legislature. Article 5-C was added to the Religious Corporations Law by Chapter 693 of the Laws of 1945, and amended by Chapter 711 of the Laws of 1948. The amendment, effective March 31, 1948, was evidently intended to interpret rather than to change the content of the 1945 Act. (*Peo. ex rel. Westchester Fire Ins. Co.* v. *Davenport*, 91 N. Y. 574; Sutherland: Statutory Construction, 3d ed., sec. 1931, p. 418) and is of especial interest since it became law after the decision was rendered herein by Trial Term, and interprets the 1945 statute otherwise than as if was construed in Trial Term's opinion, as is pointed out hereafter.

In analyzing these statutes, it should be recollected that the purpose of the Religious Corporations Law is to deal with the temporalities of religious societies, and to insure that they will be administered for the benefit of the societies for which they have been dedicated (*Walker Memorial Baptist Church* v. *Saunders*, 285 N. Y. 462, 472; *Watson* v. *Jones*, *supra*). There is no attempt by the state, acting

either through the Legislature or the courts, to enter into matters of doctrine or ecclesiastical law, except only in so far as necessary to the administration of real or personal property. In *Watson* v. *Jones*, in discussing controversies arising in the civil courts concerning property rights of religious societies, in an often quoted statement, the Supreme Court said (p. 727):

> "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

This principle is embodied in section 5 of the same chapter of the Consolidated Laws to which Article 5-C of the Religious Corporations Law was added in 1945 and 1948. The Legislature undoubtedly bore this principle in mind when in enacting Article 5-C it declared the autonomous group, represented by this plaintiff, to be the true successor and representative in America of the Russian branch of the Eastern Orthodox or Greek Catholic Church, and therefore entitled to "the custody and control of all temporalities and property, real and personal, belonging to such church and of the revenues therefrom * * *" (sec. 107, e. Religious Corporations Law). When Article 5-C was added, at least four-fifths of the parishes in the United States had joined the autonomous group, and declared themselves administratively independent of Moscow. They had firmly and convincingly avowed that the Synod and the Patriarch had lost their freedom of action, and that their ostensible administrative acts were therefore not their own. They had become puppets. It was within the competence of the Legislature, as it would be within that of the courts in the absence of legislation, in searching for the "church judi-

catories" mentioned in *Watson* v. *Jones*, whose decisions on questions of ecclesiastical rule are to be final, to determine that the higher church authorities in Moscow have become a phantom, a mere semblance having the form but not the substance of organs of the Orthodox Eastern Church, and that while under such duress their action may be treated as void or superfluous. The legislature has expressly determined that, in this instance, the church judicatories whose determinations are to be followed, are the Detroit and Cleveland conventions of 1924 and 1934 and the New York convention of 1937.

The case of *Watson* v. *Jones* involved a decision in a Presbyterian parish in Kentucky over the question of slavery at the time of the Civil War. It was held that the independent faction in that parish was subject to the Presbytery, Synod and General Assembly of the Presbyterian Church in the United States, even though it disagreed on the question of slavery. There was no such factor in that case, as in this, that the organs of the general church had ceased to have anything but a formal ecclesiastical existence of their own, and had been in reality merged in an atheistic state. To regard the high church functionaries in Russia as having administrative freedom independent of the Russian government, is as unwarranted as it would be to attempt to distiguish between the Russian state and any other communist front.

The extended narration of the history of the Russian Church in America contained in sec. 105 of Article 5-C of the Religious Corporations Law, appears to have been inserted in order to leave no room for dispute that the "group of churches, cathedrals, chapels, congregations, societies, parishes, committees and other religious organizations of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)" which had been known historically by various names, enumerated in the statute, including that of "Diocese of North America and the Aleutian Islands", and which "*were subject to the administrative jurisdiction of the Most Sacred Governing Synod in Moscow until in or about nineteen hundred seventeen, later the Patriarchate of Moscow*" do "*now constitute an administratively*

autonomous metropolitan district created pursuant to resolutions adopted at a general convention (sobor) of said district held at Detroit, Michigan, on or about or between April second to fourth, nineteen hundred twenty-four." (Italics supplied.)

The structure of this statute is not such as to provide for the incorporation of new parishes in a new religious denomination, as the majority opinion indicates, without reference to the Russian Orthodox Church as previously organized in America. This statute gives civil recognition to the action taken at the Detroit sobor in 1924, which was not concerned with organizing new parishes but in severing the old ones from control by Moscow. In plain language it describes the Russian Orthodox Church, identifying it by all of the names under which it had been known historically in this hemisphere since 1793, and then declares that this same church organization in America which was previously subject to control by the central church authorities in Moscow shall be so no longer, but shall constitute an administratively autonomous district to be known as the "Russian Church in America", erected by conventions held in the United States. Neither do we think that such a clearly stated intent on the part of the Legislature in 1945 and 1948 to act in respect of this very situation, should be nullified for the reason that in 1943 a minor amendment was passed to an old section of the Religious Corporations Law affecting the powers of trustees of the four Orthodox Greek Catholic Primary Jurisdictions in America—Constantinople, Antioch, Serbia and Moscow (L. 1943, c. 145, sec. 1, amending Rel. Corp. Law sec. 15, subd. 3), nor for the reason that in the same year (1943) a new article was added (Article 15) providing for incorporation of parishes of churches subject to any of said four Primary Jurisdictions. In any event, the 1945 and 1948 legislation, applying to this particular situation, should be held to control over the former more general enactments and, if necessary, to have repealed them *pro tanto* (*Strauch* v. *Town of Oyster Bay*, 263 App. Div. 833; *Wood* v. *Wellington*, 30 N. Y. 218).

Subdivision 1 of section 107 of Article 5-C provides that every orthodox church in this state shall recognize and be

and remain subject to the administrative authority of the governing bodies and officials of "the Russian Church in America, pursuant to the statutes for the government thereof adopted at a general convention (sobor) held in the city of New York on or about or between October fifth to eighth, nineteen hundred thirty-seven, and any amendments thereto and any other statutes or rules heretofore or hereafter adopted by a general convention (sobor) of the Russian Church in America and shall in all other respects conform to, maintain and follow the faith, doctrine, ritual, communion, discipline, canon law, traditions and usages of the Eastern Confession (Eastern Orthodox or Greek Catholic Church)."

Section 107, 3, provides for the further administration of the temporalities in accordance with church by-laws, and of the statutes for parishes of the Russian Church in America approved at a general convention thereof held at Cleveland, Ohio, from November 20 to 23, 1934, and any amendments thereto and all other rules, statutes, regulations and usages of the Russian Church in America. The Cleveland convention, held on the dates specified in this statute, was the one which named Archbishop Theophilus Pashkovsky to preside over the Russian Church in America, who will occupy St. Nicholas Cathedral if plaintiff succeeds.

Trial Term took, as we think, too restricted a view of Article 5-C of the Religious Corporations Law, in holding it "applicable only to Russian Orthodox churches which might thereafter be organized (section 106) or which, having theretofore been incorporated should thereafter be reincorporated (section 108)," and in holding that "Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America." After Trial Terms' decision, Article 5-C of the Religious Corporations Law was amended, not only so as to insert the word "administrative" to characterize the independence from Moscow of the American body, but also so as to define the application of Article 5-C to "*every Russian Orthodox church in this state, whether incorporated before or after the creation of said autonomous metropolitan district, and whether incor-*

porated or reincorporated pursuant to this article or any other article of the religious corporations law, or any general or private law." (Emphasis supplied.) This language was not intended to limit the application of Article 5-C to churches thereafter incorporated or reincorporated under that Article. Plaintiff was incorporated by a private law known as Chapter 463 of the Laws of 1925, and its corporate existence was confirmed, moreover, by Chapter 817 of the Laws of 1945, by the same Legislature which added Article 5-C to the Religious Corporations Law. We think that Article 5-C, particularly as it was amended and construed by Chapter 711 of the Laws of 1948, was intended to relate to plaintiff, and to direct the courts by what authority the temporalities of the Russian Church in America are to be administered.

In order to accomplish its purpose, this act need not be an expropriation statute, such as that which deprived the Mormon Church in Utah of property which was subsequently used for common schools (*Mormon Church* v. *United States*, 136 U. S.), nor must it involve what Trial Term further described "as a *transfer* of property of all orthodox churches in this country to the use of the newly recognized 'Russian Church in America'" (emphasis supplied). All that was intended by these statutes, being all that was necessary to the end in view, was to determine that the Russian Church in America, as defined in these acts, is the traditional Russian Orthodox Church on this continent, that the communicants are legally entitled to worship in the same buildings and have the use and revenues of the other temporalities which they had previously enjoyed, that they are not to be put out or kept out of possession upon directions emanating in reality from the Kremlin, and that the Synod and the Patriarch in Moscow are to be regarded as having no present functional existence apart from the Soviet Government. The Legislature recognized the Detroit convention of 1924, and subsequent conventions in this country, declaring the autonomous Russian Church in America to be the same religious society which had previously been known in this country by the

other names which had been borne here by the Russian branch of the Eastern Orthodox or Greek Catholic Church.

Statute does not infringe the constitutional guarantee of religious liberty nor the separation of church and state, which provides for a decent separation here between the Church and the Russian state. Statutes are presumptively constitutional (*Buoneto* v. *Buoneto*, 278 N. Y. 284), and the constitutionality of Article 5-C of the Religious Corporations Law is not subject to attack if the administrative acts of the Russian central church authority are controlled by an anti-religious dictatorship. Nothing in the cases of *Watson* v. *Jones* or *Trusteeship of Presbytery* v. *Westminster Church* holds that the state, acting through courts or legislature, cannot trace and identify under changed circumstances the religious society for whose benefit temporalities have been dedicated. Legislatures and courts have more than once been called upon to ascertain what has become of the group which the founders meant to endow, to identify it behind a changed facade, or to decide by *cy pres* what is the religious society that most nearly resembles the original if the latter has become extinct or altered beyond recognition. Construed as a legislative ascertainment under conditions now existing in the world, of the organized religious society for whose use the temporalities here in question had been dedicated, no question of constitutionality arises. Traditional Russian Orthodox parishes in the United States have declared, in effect, that they are, and as of right ought to be, free from administrative control by an aggressively atheistic Russian state. The Legislature has merely confirmed the existence of this well known fact, and has not caused any deprivation of property without due process of law, nor interfered with religious liberty. On the contrary, it has provided for the enjoyment of this property by its accustomed beneficiaries.

The majority of this court professes to be in ignorance concerning whether the domination of the central church authorities by the Russian state is really a fact, and rebukes the minority for being guided in this matter "on suspicion or news reports; we act only on legal proof."

The record contains proof on the point; but even if it did not, the wise rule was thus expressed by Lord Coleridge in *Lumley* v. *Gye* (2 El. & Bl. 266, quoted in IX Wigmore: Evidence section 2583n): "Judges are not necessarily to be ignorant in Court of what everybody else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times."

In *Nankivil* v. *Omsk All Russian Government*, 237 N. Y. 150, 156, notice was taken that recent Russian history in considerable detail is a matter of common knowledge. In 15 Ruling Case Law: Title "Judicial Notice," section 28, it is stated that "Matters of religious history are deemed to be subjects of common knowledge and therefore of judicial notice," which is also said to be taken of "the general current of human affairs, which rest entirely upon acknowledged notoriety for their claims to judicial recognition (section 1).

Moreover, the constitutionality of Article 5-C is to be presumed, and, if it depends upon the domination of the Russian central church authorities by the Soviet state, the legislature is deemed to have found that as a fact, and the burden is cast upon those who are attacking the constitutionality to establish that the fact is otherwise. In *O'Gorman & Young* v. *Hartford Ins. Co.*, 282 U. S. 251, 257-8, it was said: "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." In *Powell* v. *Pennsylvania*, 127 U. S. 678, 685, the Court stated: "And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts." In *People* v. *Lochner*, 177 N. Y. 145, 169, it was stated in a concurring opinion by Vann, J., on a question of constitutionality: "Necessarily in considering the subject we may resort to such sources of information as were open to the legislature." Again in *Noyes* v. *Erie & Wyoming Farmers*

Co-op Corp., 281 N. Y. 187, 195, the rule was declared: "But a known state of facts warranting legislative action is presumed * * *." In *Szold* v. *Outlet Embroidery Supply Co.*, 274 N. Y. 271, 278, it was stated in an opinion, per Loughran, J., in considering an assertion of facts which would impair the constitutionality of a statute: "We think the assertion is without support in the ordinary data of human experience, but if we are not supposed to know this to be so, then the presumption is that the legislature inquired and found the need * * *."

In view of the statutory enactment in this state determining that the autonomous group with which plaintiff is affiliated is the successor to the American branch of the Russian Orthodox Church, entitled to the control and administration of its properties, we are required to assume that the legislature examined into the question and determined that the central church authorities in Moscow function in reality as a department of the Russian state. The majority opinion toward the end suggests that if and when the Russian Orthodox Church no longer exists in Russia, *or* "if and when the legislature of this state may make appropriate disposition of property within this state found to be subject to its control and disposition, our courts may take other action. Thus far we find no declaration by the legislature and no proof offered to this court that the trust purposes for which plaintiff holds the cathedral have been extinguished or terminated." This statement fails to consider that, under the cases above cited, it was not necessary for the legislature in enacting Article 5-C to enumerate specifically the facts conditioning its validity, but that the existence of such facts would be presumed. Among the facts which the legislature is deemed to have found are a Patriarch and synod in Moscow dominated, directed and controlled by a totalitarian atheistic regime. If it is to be decided that the trust purposes for which plaintiff holds the cathedral require that any Christian society shall submit to administrative control by such authority, it is difficult to conceive what more aggravated circumstances could exist that would call for legislative or court action to overrule the conclusion reached by the majority herein.

It is said that there have been instances in history where a church or sect has been subject to varying degrees of political control or domination without drawing in question its functional existence. It is probable that history has never known such refined techniques, whether based upon subtle psychology or propaganda or the ruthless use of brute force, for coercing body, mind and spirit as those which have been developed with the aid of modern science, and used so effectively by totalitarian countries in the present era. A venerable church, widely respected, can be transformed into a powerful engine for the exercise of such coercion and control. That objective could not be reached except by making use of ecclesiastical forms, but the fact that these are to some extent left undisturbed indicates only that by doing so the church can more effectively be used for political opportunism, and not that there is any real area of freedom for church functionaries. It has been the unmistakable purpose of the Soviet Government to prostitute historical churches to that end, and where highly placed clerics have been bent to the will of that government, *reason dictates* that their utterances should not be regarded as the official expression of their communions but as the voice of the Politburo.

The point is not whether the Soviet Government will succeed in annihilating all religion except worship of the Russian state; it is, rather, that our law does not require us to assist in the process, so far as churches in America are concerned, by sustaining the eviction of their communicants and compelling them to find other places of worship, unless they submit to administrative direction by top level church officials who would not be permitted to function, unless they consented to the use of their powers to promote the advancement of atheistic world communism. It is not believed that the purposes of the present regime have been substantially altered, as thus expressed in a statement by Josef Stalin in his conversation with members of the First American Trade Union Delegation September 9, 1927, as set forth at pages 345-346 of this record:

> "The Party cannot be neutral with regard to religion, and it conducts antireligious propaganda against any

> and all religious prejudices because it stands for science, while religious prejudices go against science, since every religion is something contrary to science. * * * The Party cannot be neutral with regard to the bearers of religious prejudices, with regard to the reactionary clergy, poisoning the minds of the toiling masses. Have we oppressed the reactionary clergy? Yes, we have oppressed them. The trouble is only that they are not yet fully liquidated. Antireligious propaganda is the means which must carry through to the end the work of liquidating the reactionary clergy."

Whatever this statement may signify in respect to science, it is an expression of uncompromising and ruthless hostility toward Christianity. The Roman emperors Nero and Trajan also persecuted the Christians, but they were not in the anomalous position of attempting to be at the same time in actual charge of the administration of the Christian Church.

The Orthodox Eastern or Greek Catholic Church in its origin, was affected to a greater degree by the civil power exerted through the Eastern Empire, than was true in the west. It appears to be true enough that the czars, professing Christians, like the Emperor Justinian before them, frequently ruled the Church in important aspects. On the other hand, there were periods when the civil power was weak, when the Russian Church became the chief permanent institution of the Russian nation, and the patriarch of Moscow stood out as the visible center of unity (W. F. Adeney, The Greek & Eastern Churches, Scribners, 1908, pp. 406-7).

The Church in the east never had the cohesion of the Roman Catholic Church, and after Justinian's empire disintegrated, the church-state relationships made the rising forces of nationalism tend to eliminate central authority, and to divide the Orthodox Eastern Church along nationalist lines. This is said to have resulted in the establishment of about seventeen autonomous Orthodox Eastern churches (see Columbia Encyclopedia, 1946 ed., tit. "Orthodox Eastern Church", p. 1314). The Russian Orthodox

Church itself was formed by breaking away from the patriarch of Constantinople, after he became subject to the "infidels"—to a lesser degree, however, than in Russia today—upon the fall of Constantinople to the Turks at the end of the Middle Ages in 1453. This, says a leading historian (Adeney, p. 392), had the immediate consequence of gaining ecclesiastical independence for the Russian Church, resulting in the election of the Metropolitan of Moscow by a council of Russian bishops instead of his being appointed by the Patriarch of Constantinople. There was no doctrinal schism. Even when express recognition finally was wrested from the enfeebled Patriarch in 1589, and the office of Patriarch of Moscow was set up, there was grave doubt among formalists concerning the power of the Patriarch of Constantinople to do this without the approval of an œcumenical council and, furthermore, there was no ceremony of investiture. The latter was withheld as a concession to the Byzantine Greeks, who were thus enabled to adhere to the view that the Russian Church was uncanonical and void (Janin: The Separated Eastern Churches, Sands & Co., London, 1933, pp. 94-5; W. F. Adeney, op. cit., p. 392, *seq.*) "But", continues the latter author, "beyond this accession of dignity the Patriarch of Moscow had acquired no more real power than had been secured already by the Metropolitan."

The autonomous Russian Church in America is following a similar course today. The headquarters has not been in Russia for 900 years, but was in Constantinople until the Patriarch of Constantinople fell into the hands of the Turks. That created a situation which was as intolerable for the churches in Russia as the autonomous group in America are finding it today, now that the Patriarch of Moscow has fallen into the power of modern infidels. Until then there was no Patriarch of Moscow, who was brought into being by this earlier historical parallel. The fiduciary principle, on which the outcome of this case depends, can hardly be so inelastic as to require that a Christian religious society must submit to the dictates of either militant atheism or militant Mohammedanism in order to continue to possess its property.

In the case of an established national church, it is inevitable that foreign branches will become autonomous where the mother country insists upon using it is an instrument of national policy. An illustration of judicial recognition that the tides of history are not to be confined by legal fictions, is found in the holding that the Episcopal Church in America ceased to be subject to control by the Archbishop of Canterbury after the American Revolution (*Schier* v. *Trinity Church*, 109 Mass. 1, 20; Zollman: American Civil Church Law, pp. 161-2), notwithstanding that the "establishment" of the Anglican Church in England involved no such absorption of the church into the state as exists in Russia, that the cultural and traditional backgrounds of the two countries were homogeneous, and that the beliefs and ecclesiastical practices of those two demoninations were almost identical.

An appeal to history tends to result in confirmation of the legal position of the autonomous Russian Church in America as successor to the branch of the Russian Orthodox Church on this continent, and in the conclusion that the Legislature has acted within the historical pattern of the Orthodox Eastern Church in accordance with which the church in Russia itself was established.

In these latter days there have been declarations by high ecclesiastics, before being arrested in communist countries, to disregard whatever they may afterward say. The human being cannot always forecast what he will say or do when subjected to extremes of physical or mental torture. Religious leaders have sometimes found it possible to be foresighted enough to delegate their authority in anticipation of such catastrophes. The Russian high church authorities in recent times endeavored to do so in event of dioceses cut off from Moscow by "military movements". The Patriarch and Holy Synod, while they still enjoyed some freedom of action, were not farsighted enough expressly to delegate power to branches of the Russian Orthodox Church beyond the reach of Soviet control, in anticipation of absorption of the central authority into the Russian state. There is indication in this record that Patriarch Tikhon, had he known what was to come, might have done

something of that kind. His hand appears to have been forced, however, and he died in 1925. There is no reason to believe that Patriarch Alexi could have been appointed or continue to hold office if he were not a willing tool of the Kremlin.

If express delegation of authority in advance is indispensable, it would appear to be a postulate of that principle, that if the central church authority in Russia had been prevented from functioning by German military occupation during World War II, the American and other foreign branches of the Russian Orthodox Church could not have operated outside of the orbit of the captured central authority, except as the latter had previously authorized them to do so. The German invaders, if Moscow had fallen, could, in the absence of that formality, have been masters of the Orthodox Russian Church throughout the world. If this be true, it behooves every church organization within striking range of Soviet power to discern the pattern of the future—whatever that may be—and to delegate authority accurately in anticipation of all contingencies, since otherwise under the majority ruling herein whoever seizes the central organs of authority will have *de jure* control of the functioning of the entire religious society wherever situated.

In ecclesiastical as well as in legal thinking, there is a well grounded professional instinct that lines of authority should be rendered explicit, but it seems to be a *reducio ad absurdum* to regard the absence of such anticipatory express delegations as a warrant of power for usurpers of ecclesiastical rule. It is sound legal doctrine to treat as null and void the words and acts of persons or officials who have been deprived of their freedom of action. Nor should the historical Russian Church in the United States be held to have disintegrated, for the reason that the voluntary direction and consent of the Patriarch and the Holy Synod in Moscow are no longer obtainable. Expressly delegated lines of authority are desirable, but if they be always essential, a church communion would be in a sorry plight if its high officials, failing to read the future correctly, neglected to delegate administrative power, or did

so in the wrong direction or to the wrong persons. Nice questions might arise, even then, of power to delegate power, and a vital church organism be strangled in legal technicalities.

The majority opinion states that we have misunderstood the controversy between these parties; the record shows that we have not misunderstood it, that there is a fundamental matter in difference, and of a type that is not likely to be settled until it is settled right.

The judgment appealed from should be reversed with costs, and judgment entered awarding to the plaintiff possession of the real property described in the complaint, to be held by it subject to its acts of incorporation, by-laws and the statutes, regulations and usages of the Russian Church in America described in Article 5-C of the Religious Corporations Law.

DORE, J., concurs.

EXHIBIT D

Opinion. SUPREME COURT. TRIAL TERM—PART X.

By MR. JUSTICE BOTEIN. *St. Nicholas Cathedral of the Russian Orthodox Church in N. Y. v. Fedchenoff*—In 1925 the Appellate Division of this department held that one John S. Kedrovsky was the accredited Archbishop of the North American Diocese of the Russian Orthodox Church and as such entitled to occupy the Cathedral of Saint Nicholas in New York (*Kedrovsky* v. *Rojdesvensky*, 214 App. Div. 483). Its determination was affirmed without opinion by the Court of Appeals (242 N. Y., 547).

Kedrovsky had sought to prevent the defendant Rojdesvensky, who likewise claimed a valid appointment as Archbishop of the North American Diocese, from occupying the cathedral. The complaint asserted that the defendants were not the archbishop and dean of the church, and that by their occupancy they were diverting the property of the church from the trust to which it was subject, that is, occupancy by the accredited archbishop and dean. The complaint took the form of an action for the enforcement

of the trust upon the real property occupied by the defendants.

In arriving at this decision the Appellate Division found that none of the bodies purporting to recognize Rojdesvensky as an archbishop was shown to have had any authority to appoint an archbishop. The court, on the other hand, found that Kedrovsky was appointed by the Holy Synod and that this body derived its powers to make a valid appointment from a legally convoked Sobor, or ecumenical convention of the church, held in Moscow in 1923. "As to Kedrovsky's authorizations from the Holy Synod there is no dispute whatsoever. The Holy Synod has authority to appoint an archbishop for North America and a delegate of the Holy Synod" (p. 488).

The court therefore concluded (p. 489): "To set aside the actions of the second Sobor under these conditions in favor of the shadowy claim of the defendant Rojdesvensky, on the theory that the doctrinal necessities of the Russian Church require it, would put a civil tribunal of New York in ascendency over the ecclesiastical authority in the decision of a purely ecclesiastical question with which it can have no concern."

In making this determination, the courts were applying well-defined principles enunciated in the leading cases of *Watson* v. *Jones* (13 Wall., 679), and *Trustees of Presbytery* v. *Westminster Church* (222 N. Y., 305). Each of these cases, as well as the instant one, grew out of a schism "which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to use the property so acquired" (*Watson* v. *Jones, supra,* p. 726). Both leading cases, as well as the instant one, involved the third of the three classes of cases discussed in *Watson* v. *Jones.* "It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government" (p. 726).

In laying down the rule governing such cases, the Supreme Court, in *Watson* v. *Jones*, avowedly departed from the doctrine of the English courts. It held "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a prepondering weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them" (p. 727). * * * It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for" (p. 729).

In *Trustees of Presbytery* v. *Westminster Church* (*supra*) the Court of Appeals rejected "the claim of defendants in substance that they will be obeying all the requirements of denomination uses if they devote the property in their custody to the observance and propagation of what may be regarded as the general, fundamental principles of the Presbyterian faith, although they secede from the church organization at large with which they have been affiliated and utterly refuse to obey its government or be bound by its rules and regulations" (p. 313). The court went on to say: "Expressed in another form, defendants' claim is that they can utilize the church property of which they hold title for the maintenance and support of an 'independent' Presbyterian church—a church free and independent of any government or control of the Church at large. * * * We do not accept this view."

The opinion rendered in *Kedrovsky* v. *Rojdesvensky*, over twenty years ago, while not citing these authorities, groups itself logically in the pattern they set. It simply directed that occupancy of a cathedral built in 1903, for a diocese established in 1793, with funds furnished in large

part by the Russian Orthodox Church in Russia, should be given to an archbishop duly appointed by that church—not to an archbishop deriving his authority from a convention held in Detroit in 1924, which, as the court put it, "purported to secede from the Russian Church and to make Rojdesvensky Archbishop of an independent church" (p. 487).

Opinion.

It is in this setting that we must consider the facts that have transpired in the ensuing twenty-odd years and which have led to the institution of this lawsuit.

Following final court determination of his right to occupancy, Kedrovsky entered into possession of the cathedral. The plaintiff corporation, which was incorporated by special act of the Legislature in 1925 and claims legal title to the cathedral, permitted him to remain in possession until his death in 1934. The plaintiff corporation likewise made no effort to oust Kedrovsky's son, Nicholas J. Kedroff, who claimed to have succeeded him as ruling archbishop, and he remained in possession until his death in 1944. During this period the breach still existed between those who acknowledged the spiritual leadership of the Patriarch of Moscow, but who asserted and maintained autonomy in all other regards, and those who subscribed to the administrative as well as spiritual leadership of the Patriarch and Holy Synod. The head of the first group is Metropolitan Theophilus; the latter group is headed by the defendant Metropolitan Benjamin.

This is an action in ejectment, tried before the court without a jury. The plaintiff, claiming to be the owner in fee, seeks immediate possession of the cathedral, which it asserts is being unlawfully withheld from it by the two defendants. We need only determine the rights of one defendant, Metropolitan Benjamin, as the other defendant concededly derives whatever rights he might possess through the former.

The defendant, by way of separate defenses, alleges that as accredited Archbishop of the North American Diocese he is entitled to possess, occupy and use the premises, that

the plaintiff has no authority to bring this action, and that the action is barred by the statute of limitations and by the plaintiff's laches. At the conclusion of the trial the defendant also urged that the plaintiff's title to the property involved is defective and that it had failed to prove the necessary ingredients of an action in ejectment.

Ejectment is a proper form of action for the determination of the right of possession of property held or claimed by a religious corporation (*Westminster Presbyterian Church* v. *Trustees of Presbytery*, 170 App. Div., 439). The plaintiff in this case holds title to the cathedral for the benefit of the North American Diocese and of the ecclesiastical dignitaries entitled to possession (*Kedrovsky* v. *Rojdesvensky, supra*). It, by its trustees or officers, may bring an action in ejectment when, as claimed here, the persons entitled to possession are alleged to have been unlawfully ousted and refused reentry. "The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use * * *. They have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church" (*Watson* v. *Jones, supra*, p. 720). * * * "They (the defendants) should be compelled to recognize these rights and permit those who are the real beneficiaries of the trust held by them to enjoy the uses, to protect which that trust was created" (p. 721).

The one issue which looms large in this case is whether, as asserted by the plaintiff, Metropolitan Theophilus is the accredited head of the church in North America, or whether, as claimed by the defendant Metropolitan Benjamin, he is that head.

The facts in this case parallel, with a fidelity seldom encountered in litigation, the facts in the *Kedrovsky* case. The Holy Synod was there held to have had the authority to appoint the ruling archbishop and there was no dispute as to Kedrovsky's authorization from that church body. Likewise, there is no dispute in this case that the defendant Metropolitan Benjamin was duly appointed by the Patriarch and Holy Synod as ruling archbishop in 1934, following Kedrovsky's death. It was also held that the group

which "purported to secede from the Russian Church and make Rojdesvensky Archbishop of an independent church" had no authority to appoint the ruling archbishop. It is this same group which now purports to designate Metropolitan Theophilus as ruling archbishop and the plaintiff corporation, by virtue of such designation, seeks judgment which in effect would secure possession of the cathedral for Metropolitan Theophilus.

The plaintiff has, at least inferentially, assailed the soundness of the findings made by the Appellate Division in the *Kedrovsky* case as to the canonical validity of Kedrovsky's appointment and the invalidity of Rojdesvensky's purported appointment, and asks this court, in substance, to distill different findings from substantially the same evidence that was submitted in the earlier case. This, of course, may not be done, and the inexorable parallel between the *Kedrovsky* case and the instant case would seem immediately to require judgment for the defendant. However, intervening legislation must first be considered.

Opinion.

In 1945 the new article 5-c of the Religious Corporations Law relating to Russian Orthodox churches was enacted. This statute constitutes a legislative recognition of the historical fact that since 1924 a representative group of Russian Orthodox churches, formerly subject to heirarchial administrative and spiritual control of the Sacred Synod, have asserted their administrative autonomy and have organized an independent Russian church in America. Accordingly, the statute defines the "Russian Church in America" and a "Russian Orthodox Church" (section 105) provides for the incorporation of a Russian Orthodox Church (section 106), the management of its affairs and property (section 107) and reincorporation of existing incorporated Russian churches as newly incorporated Russian Orthodox Churches (section 108).

There is nothing in the statute which indicates a legislative intent to accomplish a transfer of property of all Russian Orthodox Churches in this country to the use of the newly recognized "Russian Church in America." There

are no legislative findings accompanying article 5-c which might be expected were that the Legislature's intent. It contains none of the bluntness and direct statement of an expropriation statute such as the Act of Congress of 1887 recited in *Mormon Church* v. *United States* (136 U. S. 1).

It is urged that the statute inferentially provides for the dedication and use of the property of *all Russian* Orthodox Churches for the benefit of and at the direction of the Russian Church in America. While the statute so states (section 107) it is limited by the definition in section 105 preceding which defines a Russian Orthodox church as one "founded and established for the purpose and with the intent of adhering to, and being subject to the jurisdiction of, the Russian Church in America." When St. Nicholas Cathedral was "founded and established" there could have been neither "purpose" nor "intent" to adhere and to be subject to the "Russian Church in America," for that church was not then factually in existence.

All that the new article 5-c accomplished was to provide a framework for jurisdiction and authority over churches and their property in accordance with the rules, regulations and usages of the Russian Church in America (section 107), applicable only to Russian Orthodox churches which might thereafter be organized (section 106) or which, having theretofore been incorporated, should thereafter be reincorporated (section 108). Since St. Nicholas Cathedral falls within neither of these categories, it follows that its use is not subject to the direction of the Russian Church in America.

This conclusion as to the scope of article 5-c of the Religious Corporations Law makes it unnecessary to consider the question of the constitutionality of the statute as violative of "due process" in effecting a transfer of property.

Judgment is accordingly directed for the defendants. Suggestions as to the form and subject matter of the judgment will be entertained upon settlement of the judgment. Settle judgment.

New York Law Journal, Thursday, February 19, 1948.